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ORDERS

CONNECTICUT REPORTS

VOL. 335

U.S. BANK TRUST, N.A., TRUSTEE
v. MARK E. O'BRIEN ET AL.

The named defendant's petition for certification to appeal from the Appellate Court, 196 Conn. App. 903 (AC 43004), is denied.

Mark E. O'Brien, self-represented, in support of the petition.

Adam L. Avallone, in opposition.

Decided June 10, 2020

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CONNECTICUT APPELLATE REPORTS

Vol. 198

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* ANTHONY DYOUS (AC 42006)

DiPentima, C. J., and Keller and Bear, Js.

Syllabus

The defendant acquittee, who had been found not guilty of certain crimes by reason of mental disease or defect, appealed to this court from the judgment of the trial court granting the state's petition filed pursuant to statute (§ 17a-593) to extend his commitment to the jurisdiction of the Psychiatric Security Review Board, claiming that the court improperly found that, at the time of the state's petition, he was mentally ill and dangerous to himself or others. Following a hearing on the state's petition, the board determined that the acquittee remained an individual with psychiatric disabilities and, if he were discharged from the jurisdiction of the board, he would present a danger to himself or others. Thereafter, the court held a hearing and granted the state's petition and extended the acquittee's commitment to the board for an additional four years. From the judgment rendered thereon, the acquittee appealed to this court. *Held* that the trial court's findings that the acquittee, at the time of the petition to extend his commitment, suffered from a mental illness and that he would present a danger to himself or others as a result of his mental illness if released from the jurisdiction of the board, were not clearly erroneous: the court found both the board's report, which summarized the acquittee's mental health history and set forth his multiple diagnoses, and the testimony of G, the acquittee's treating psychiatrist, to be credible, at the outset of the board's report, the participating board members attested to their presence at the hearing, that they had reviewed the record, and that the report issued to the court was based entirely on the record, the law and the board's specialized knowledge and familiarity with the acquittee, and the totality of the evidence supported the court's finding that the acquittee presented a danger to himself or others if released from the jurisdiction of the board, including a review of the acquittee's lengthy struggle with mental illness, his failure to cooperate with treatment and medication recommendations and his past violent behaviors and mental health decompensations when outside of a maximum security setting.

Argued January 7—officially released June 23, 2020

Procedural History

Petition for an order extending the defendant's commitment to the Psychiatric Security Review Board, brought to the Superior Court in the judicial district of Windham and tried to the court, *J. Fischer, J.*; judgment granting the petition, from which the defendant appealed to this court. *Affirmed.*

Richard E. Condon, for the appellant (defendant).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *Anne F. Mahoney*, state's attorney, and *Andrew J. Slitt*, assistant state's attorney, for the appellee (state).

Opinion

DiPENTIMA, C. J. The defendant, Anthony Dyous (acquittee),[1] appeals from the judgment of the trial court granting the state's petition to extend his commitment to the jurisdiction of the Psychiatric Security Review Board (board) for a period of four years. On appeal, the acquittee claims that the court improperly found that, at the time of the state's petition, he was mentally ill and dangerous to himself or others. We disagree and, accordingly, affirm the judgment of the trial court.

The acquittee's psychiatric history and proceedings with the criminal court and the board have been detailed extensively in *State* v. *Dyous*, 307 Conn. 299, 53 A.3d 153 (2012) (*Dyous I*), and *State* v. *Dyous*, 153 Conn. App. 266, 100 A.3d 1004 (2014) (*Dyous II*), appeal dismissed, 320 Conn. 176, 128 A.3d 505 (2016) (certification improvidently granted). These opinions set forth the following relevant facts and procedural history. On March 22, 1985, the acquittee was found not guilty by reason of mental disease or defect of two counts of kidnapping in the first degree, two counts of threatening in the second degree, and one count of carrying a dangerous weapon.[2] *Dyous II*, supra, 268. The trial court committed the acquittee to the custody of the Commissioner of Mental Health for a period not to exceed twenty-five

[1] "[An] [a]cquittee is any person found not guilty by reason of mental disease or defect pursuant to [General Statutes] § 53a-13 . . . ." (Internal quotation marks omitted.) *State* v. *Vasquez*, 194 Conn. App. 831, 832 n.1, 222 A.3d 1018 (2019), cert. denied, 334 Conn. 922, 223 A.3d 61 (2020); see also General Statutes § 17a-580 (1); Regs., Conn. State Agencies § 17a-581-2 (a) (2).

[2] See General Statutes §§ 53a-92 (a) (1), 53a-62 (a) (1) and 53-206, respectively.

years. Id. In March, 1985, the acquittee was transferred to the custody of the board pursuant to General Statutes § 17a-582. Id.[3]

Our Supreme Court set forth the details of the events that led to the acquittee's initial commitment to the custody of the board and subsequent events up to this third petition by the state for his continued commitment. "Between 1977 and the time of the incident [that] resulted in his criminal commitment, the [acquittee] was hospitalized three times in psychiatric facilities. Thereafter, in December, 1983, the [acquittee] hijacked a bus carrying forty-seven people, including a child. He threatened the driver with a bomb and nerve gas, and stated he had been asked by God to deliver a message. During and after this incident, the [acquittee] exhibited signs of delusional thinking and symptoms of psychosis. The [acquittee] was arrested, found not guilty by reason of [insanity] and committed . . . for a period of twenty-five years. The [acquittee] was confined to the Whiting Forensic Institute [(Whiting), a maximum security psychiatric facility] for a period of time and then transferred to . . . Norwich State Hospital.

"On January 17, 1986, the [acquittee] escaped from Norwich [State Hospital] with a female peer, and they traveled to South Carolina, to Texas and, finally, to Mexico. When [the acquittee was] located in Mexico in September, 1986, [he] exhibited symptoms of psychosis. He was returned to Connecticut and, upon admission to Whiting, was found to be grossly psychotic and experiencing auditory and visual hallucinations as well as grandiose and persecutory delusions. While at Whiting, he was thereafter involved in a violent incident [that resulted in his own injuries, as well as injuries to staff members] and other patients.

[3] See generally *Payne* v. *Fairfield Hills Hospital*, 215 Conn. 675, 682–83 n.5, 578 A.2d 1025 (1990) (noting statutory enactments that created and empowered board, including its jurisdiction over all acquittees confined prior to its effective date).

"In 1989, based on his clinical stability, the [acquittee] was transferred to Norwich [State Hospital]. From [1990 through 1992], he was granted a series of temporary leaves [that] were terminated when he rendered a positive drug screen for cocaine. After a [period of] time, temporary leaves were reinstated, and, in July, 1995, he was granted a conditional leave. In June, 1996, the [acquittee] began to exhibit symptoms of psychosis and admitted that he had stopped taking his antipsychotic medication. He was admitted to Connecticut Valley Hospital but refused some of his medications. A few days later, he escaped from [that] hospital, and, several days thereafter, he was found . . . [and] returned to Whiting. At that time, he was exhibiting psychotic and paranoid symptoms, as well as delusional thinking. He became violent and was placed in four point restraints for six hours.

"During the next several years, the [acquittee] remained at Whiting and was involved in a series of assaults. From 1996 [through] 2005, the [acquittee's] behavior at Whiting was characterized by chronic refusal to take medication, irritability, mood lability, grandiosity, paranoid ideation, rule breaking, physical altercations with peers and refusal to engage meaningfully in treatment.

"In 2005, there was a reduction in the [acquittee's] aggression, an improvement in his participation in treatment and increased cooperation with his treatment team. Based on [these improvements], in mid-2006, the [acquittee] was transferred to Dutcher [Hall of Connecticut Valley Hospital], a less secure [area] on the hospital campus. Treatment records after the transfer show that the [acquittee exhibited] episodic irritability, mood instability, grandiosity, paranoid ideation and [that] he refused to take his medication, claiming [that] he could control his behavior. Ultimately, the treatment team convinced him to take . . . mood stabilizing medication, but [he then] changed his mind and refused.

A treatment impasse ensued, and the [acquittee] was transferred to another unit. In the new unit, his psychiatrist noted mood lability and ongoing conflicts with peers. After working closely with the [acquittee], the psychiatrist was able to convince him to take the mood stabilizing medication, Trileptal. Even after starting Trileptal, however, the [acquittee] had another altercation with a peer and was again transferred. In December, 2009, he was transferred to yet another unit following problems with another patient.

"During his twenty-five year term of commitment to the jurisdiction of the board, the [acquittee] filed two applications for discharge, the first in 2003 and the second in 2007. The trial court dismissed both applications. In dismissing the more recent application, the trial court observed that [t]here is little or no dispute that the [acquittee] suffers from a long-standing mental illness. . . . [O]n January 31, 2007, the [acquittee's] diagnosis included delusional disorder, grandiose and persecutory type, and, most recently, the [acquittee] has been diagnosed with schizoaffective disorder, bipolar type. The trial court also observed that [t]he evidence is undisputed that, if the [acquittee] is released [into] the community, he would require supervision and treatment and that, without such services, he would be a danger to himself or others. The court further noted that [t]he [acquittee's] history belies his representation that he will continue to engage in supervision and treatment in the community or that he is ready to be discharged without mandatory supervision. The records are replete with evidence of substance abuse, noncompliance with treatment recommendations and repeated failures to meaningfully engage in treatment. Moreover, throughout his commitment, the [acquittee] has demonstrated little insight into his illness and, instead, has sought to justify or rationalize his behavior. Additionally, despite a history of psychotic episodes, the [acquittee] remains steadfast in his opposition to taking antipsychotic medication [even] [t]hough medication has been shown to ameliorate [the acquittee's] symptoms . . . . Finally, the court observed that, even in the controlled environment of his inpatient hospitalization, the [acquittee] has repeatedly demonstrated behavior [that] has put others at risk of harm.

"In 2009, approximately one year before the end of the [acquittee's] term of commitment, the state filed a petition for an order of continued commitment, arguing that the [acquittee] remained mentally ill and that his discharge would constitute a danger to himself or others." (Internal quotation marks omitted.) *Dyous I*, supra, 307 Conn. 304–307. Our Supreme Court affirmed the judgment of the trial court granting the state's petition to extend the acquittee's commitment for an additional three years. Id., 302, 304.

On April 24, 2012, the state filed a second petition for continued commitment on the bases that the acquittee remained mentally ill and that his discharge from the custody of the board would constitute a danger to himself or others. *Dyous II*, supra, 153 Conn. App. 270. After a two day hearing, the court summarized the acquittee's history. Id., 270–71. It then set forth, in greater detail, the relevant facts that had occurred subsequent to the first extension of the acquittee's commitment. Id., 271. "In March, 2010, the [acquittee] described himself as a [prisoner of war], who was being held in violation of human rights standards. On April 26, 2010, he assaulted another patient by hitting the patient with a radio, leading to his conviction on April 8, 2011, of assault in the third degree. Chemical tests administered at about that time revealed that for more than two years, the [acquittee] falsely had indicated that he was taking his medication; he surreptitiously was spitting out the pills.

"The court found the following events outlined in the board's report. On December 29, 2010, the [acquittee] pushed another patient to the floor and grabbed the patient by the throat. The incident ended only when hospital police intervened. In March, 2011, a female patient complained of the [acquittee's] behavior, which was characterized as sexual harassment and unwelcome (but not, apparently, criminal) touching. Between March, 2010, and June, 2012, the [acquittee's] posture toward the medical staff was influenced by his belief that his commitment was illegal. He refused to engage in therapy or to take his medication. The staff determined that the [acquittee] continued to be mentally ill and in need of medical attention. In June, 2012, the [acquittee] exhibited greater cooperation and self-control, but he continued to refuse to take his medication. The results of the [acquittee's] September 15, 2012 psychological assessment revealed that he had no current acute symptoms of bipolar disorder, and that, within an institutional setting he has refrained from using alcohol and illegal drugs.

"At the hearing on the second petition to extend the [acquittee's] commitment, the board's report to the court was placed into evidence, and Mahboob Aslam, the [acquittee's] treating psychiatrist, testified. The court noted Aslam's expert testimony that interepisodal recovery while a patient remains in a highly structured environment is common; equally common . . . is the predictability of a relapse when a person leaves that structure, as the person lacks insight into his malady, and resists taking medication and continuing in therapy.

"In its memorandum of decision, the court found that a clinical consensus existed that the [acquittee] remains mentally ill and, despite his present state of relative lucidity, needs medication, which he refuses to take, and support, which he rejects. The court also found that if the [acquittee] is to become a person who is not a danger to himself or others, he needs to take his medication and accept support. The court found by clear and convincing evidence that, at the time of the hearing, the [acquittee] presented a danger to himself or to others such that he would be a risk of imminent physical injury to others or to himself if he were released." (Internal quotation marks omitted.) *Dyous II*, supra, 153 Conn. App. 271–72. This court affirmed the extension of the defendant's commitment to March 18, 2018. See id., 267–68, 272.

The present appeal arises from the December 8, 2017 petition for an order of continued commitment filed by the state pursuant to General Statutes § 17a-593. Therein, the state represented that the acquittee remained mentally ill to the extent that his discharge would constitute a danger to himself or others. On January 5, 2018, the board held a hearing to review the acquittee's status. See General Statutes § 17a-593 (d). Neither the acquittee nor his attorney attended this proceeding.

The report of the board summarized the acquittee's mental health history and set forth his multiple diagnoses. Ultimately, it found that he remained an individual with psychiatric disabilities and that were he discharged from the jurisdiction of the board, he would present a danger to himself or others.

On March 12, 2018, the court held a hearing on the state's petition. The board's report was admitted into evidence. Additionally, the court heard testimony from James Gusfa, the acquittee's treating psychiatrist at Whiting for the preceding eighteen months. After the presentation of evidence and arguments of counsel, the court rendered its oral decision. At the outset, it found both the board's report and Gusfa's testimony to be credible. The court then noted the seriousness of the criminal conduct in this case, and the acquittee's lack of participation in recommended treatment groups, poor insight into his mental illness and refusal to take recommended medication. It also referred to the acquittee's altercation with another patient, where the acquittee had acted in a confrontational and "very aggressive" manner. The court additionally pointed out that Gusfa could not or would not move the acquittee to a less secure setting. In conclusion, the court found, by clear and convincing evidence, that the acquittee was mentally ill and a danger to himself or others if released. Accordingly, it granted the state's petition and extended the acquittee's commitment to the board for an additional four years. This appeal followed. Additional facts will be set forth as needed.

On appeal, the acquittee claims that the court's findings that he was mentally ill, and, if released from the jurisdiction of the board, posed a danger to himself or others, were clearly erroneous. Specifically, with respect to the former, the acquittee argues that there is no evidence that the board or Gusfa had relied on the current version of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5)[4] of the American Psychiatric Association in determining the acquittee's mental health diagnosis, as required by § 17a-581-2 of the Regulations of Connecticut State Agencies. Regarding the latter, the acquittee contends that the state failed to prove, by clear and convincing evidence, that he posed a risk of imminent physical injury to himself or others if discharged from the custody of the board. We are not persuaded by either of the acquittee's arguments.

We begin with a review of our jurisprudence regarding the board and acquittees and then set forth our standard of review. When a criminal defendant is found not guilty by reason of mental disease or defect; see General Statutes § 53a-13;[5] the court holds a hearing to

[4] The acquittee's counsel sent a letter, pursuant to Practice Book § 67-10, to this court confirming that the DSM-5 was published in 2013.

[5] General Statutes § 53a-13 (a) provides: "In any prosecution for an offense, it shall be an affirmative defense that the defendant, at the time the defendant committed the proscribed act or acts, lacked substantial capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law."

Our Supreme Court has noted that "[a] verdict of not guilty by reason of mental disease or defect establishes two facts: (1) the person committed assess that individual's mental status and to determine whether confinement or release is appropriate.[6] See *State* v. *Harris*, 277 Conn. 378, 382–83, 890 A.2d 559 (2006); see also General Statutes § 17a-582 (a) and (e); *State* v. *Kelly*, 95 Conn. App. 31, 33–34, 895 A.2d 801 (2006). If the acquittee fails to meet his burden of proof that he should be discharged, the court must commit the acquittee to the jurisdiction of the board for a term not exceeding the maximum sentence that could have been imposed had there been a criminal conviction. See *State* v. *Harris*, supra, 383. The board determines where to confine the acquittee and holds hearings and periodically reviews the progress of the acquittee to determine whether conditional release or discharge is warranted. See id.; see also General Statutes §§ 17a-583 through 17a-592. The acquittee also may apply periodically to be discharged from the board's jurisdiction. See General Statutes § 17a-593 (a)–(d); *State* v. *Vasquez*, 194 Conn. App. 831, 836–37, 222 A.3d 1018 (2019), cert. denied, 334 Conn. 922, 223 A.3d 61 (2020); *State* v. *Jacob*, 69 Conn. App. 666, 669, 798 A.2d 974 (2002). This confinement, although resulting initially from an adjudication in the criminal justice system, does not constitute a punishment; rather, it serves the purposes of treating the acquittee's mental illness and protecting the acquittee and society. See *State* v. *Damone*, 148 Conn. App. 137, 164–65, 83 A.3d 1227, cert. denied, 311 Conn. 936, 88 A.3d 550 (2014); see also *State* v. *Harris*, supra, 277 Conn. 394 (primary purposes of commitment are treatment of mental illness and protection of society, not punishment of acquittee); *Payne* v. *Fairfield*

an act that constitutes a criminal offense; and (2) he committed the act because of mental illness." *State* v. *Long*, 268 Conn. 508, 540, 847 A.2d 862, cert. denied, 543 U.S. 969, 125 S. Ct. 424, 160 L. Ed. 2d 340 (2004).

[6] "The statutory scheme that applies to . . . acquittees can be found at General Statutes §§ 17a-580 through 17a-603, inclusive." *State* v. *Jacob*, 69 Conn. App. 666, 675 n.8, 798 A.2d 974 (2002).

Hills Hospital, supra, 215 Conn. 683–84 (same); see generally General Statutes § 17a-593 (g) (at continued commitment hearing, primary concern is protection of society). "The committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous. . . . As he was not convicted, he may not be punished. His confinement rests on his continuing illness and dangerousness." (Internal quotation marks omitted.) *State* v. *Damone*, supra, 165.

At the conclusion of the commitment period, the state has the option to seek an extension.[7] "When an acquittee reaches the end of the definite term of commitment set by the court, the state may submit a petition for continued commitment if reasonable cause exists to believe that the acquittee remains a person with psychiatric disabilities . . . to the extent that his discharge at the expiration of his maximum term of commitment would constitute a danger to himself or others . . . . General Statutes § 17a-593 (c).[8] After the state files its petition, the board is required, by statute, to submit a report to the court setting forth the board's findings and conclusions as to whether discharge is warranted. General

[7] Until the maximum period of confinement has expired, if the acquittee seeks a discharge from the board's jurisdiction, he or she must show by a preponderance of the evidence that he is not dangerous. Thereafter, "if the state seeks to continue the acquittee's commitment, it must then carry the burden of proving by clear and convincing evidence that the acquittee is mentally ill and dangerous." *State* v. *Jacob*, supra, 69 Conn. App. 687.

[8] General Statutes § 17a-593 (c) provides: "If reasonable cause exists to believe that the acquittee remains a person with psychiatric disabilities or a person with intellectual disability to the extent that his discharge at the expiration of his maximum term of commitment would constitute a danger to himself or others, the state's attorney, at least one hundred thirty-five days prior to such expiration, may petition the court for an order of continued commitment of the acquittee." Our Supreme Court has held that the time frame for the filing of the petition to extend a commitment is directory and not subject to dismissal on the grounds of untimeliness unless such delay has prejudiced the acquittee. *State* v. *Metz*, 230 Conn. 400, 408–11, 645 A.2d 965 (1994).

Statutes § 17a-593 (d).[9] When making its decision, the Superior Court is not bound by the board's recommendation, but considers the board's report in addition to other evidence presented by both parties and makes its own finding as to the mental condition of the acquittee . . . ." (Footnotes added; internal quotation marks omitted.) *State* v. *Harris*, supra, 277 Conn. 384; see also *Dyous I*, supra, 307 Conn. 307–309. At this proceeding, the state must prove the need for continued commitment by demonstrating, under the clear and convincing evidence standard, "that the acquittee is currently mentally ill and dangerous to himself or herself . . . ." (Internal quotation marks omitted.) *State* v. *Harris*, supra, 386; see also *Dyous I*, supra, 307 Conn. 308; *State* v. *Metz*, 230 Conn. 400, 425–26, 645 A.2d 965 (1994); *State* v. *Damone*, supra, 148 Conn. App. 164. At this proceeding, however, the court's primary concern is the protection of society. *Dyous I*, supra, 308–309.

We turn now to our standard of review. "The determination as to whether an acquittee is currently mentally ill to the extent that he would pose a danger to himself or the community if discharged is a question of fact and, therefore, our review of this finding is governed by the clearly erroneous standard. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed . . . . Conclusions are not erroneous unless they violate law, logic

[9] General Statutes § 17a-593 (d) provides: "The court shall forward any application for discharge received from the acquittee and any petition for continued commitment of the acquittee to the board. The board shall, within ninety days of its receipt of the application or petition, file a report with the court, and send a copy thereof to the state's attorney and counsel for the acquittee, setting forth its findings and conclusions as to whether the acquittee is a person who should be discharged. The board may hold a hearing or take other action appropriate to assist it in preparing its report."

or reason or are inconsistent with the subordinate facts. The court's conclusions are to be tested by the findings and not the evidence. . . . Conclusions logically supported by the finding must stand." (Citation omitted; internal quotation marks omitted.) *State* v. *Damone*, supra, 148 Conn. App. 165; see also *State* v. *Maskiell*, 100 Conn. App. 507, 521, 918 A.2d 293, cert. denied, 282 Conn. 922, 925 A.2d 1104 (2007); *State* v. *Jacob*, supra, 69 Conn. App. 680.

The acquittee first argues that the court improperly found that he suffered from a mental illness at the time of the state's third petition. Specifically, he contends that neither the board's report nor Gusfa's testimony, the two evidentiary sources presented to the court at the hearing, referred to the DSM-5, and, in light of this "evidentiary void," the court's finding of his mental illness cannot stand.

We begin with the controlling statutory language. Section 17a-593 (c) provides: "If reasonable cause exists to believe that the acquittee remains a person with psychiatric disabilities or a person with intellectual disability to the extent that his discharge at the expiration of his maximum term of commitment would constitute a danger to himself or others, the state's attorney, at least one hundred thirty-five days prior to such expiration, may petition the court for an order of continued commitment of the acquittee." General Statutes § 17a-580 (7) provides that " '[p]sychiatric disability' includes any mental illness in a state of remission when the illness may, with reasonable medical probability, become active. 'Psychiatric disability' does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct . . . ."

In *State* v. *March*, 265 Conn. 697, 704, 706–707, 830 A.2d 212 (2003), our Supreme Court interpreted the terms "psychiatric disabilities" and "mental illness or mental disease."[10] After setting forth the applicable statutes and regulations, the court concluded: "*Mental illness means any mental illness or mental disease as defined by the current Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association* and as may hereafter be amended." (Emphasis added; internal quotation marks omitted.) *State* v. *March*, supra, 706–707; see also *State* v. *Vasquez*, supra, 194 Conn. App. 838–39; *State* v. *Kalman*, 88 Conn. App. 125, 138, 868 A.2d 766, cert. denied, 273 Conn. 938, 875 A.2d 44 (2005).

The report of the board, which was admitted into evidence as an exhibit at the court's March 12, 2018 hearing, set forth the following findings of fact: "[The acquittee] is a psychiatrically ill individual with the diagnoses of Bipolar Disorder, Most Recent Episode Hypomanic, [i]n Full Remission; Unspecified Personality Disorder, With Paranoid, Narcissistic and Antisocial Traits and Alcohol and Cannabis Use Disorder [i]n Sustained Remission [i]n A Controlled Environment. Since the [b]oard's last report to [the] court dated December 27, 2012, [the acquittee] has remained confined in maximum security, where he has resided since September, 2010. [The acquittee] had a lengthy psychiatric history with intermittent episodes of assaultive and aggressive behavior, treatment noncompliance and two escapes from treatment settings.

"[The acquittee] recently demonstrated some improvement in his treatment group participation. However, he has resisted attempts to encourage and motivate him to transfer to a less restrictive hospital setting, maintaining a fixed belief that he has been illegally confined. Despite his many years of inpatient treatment, [the acquittee] has poor insight into the mental illness

[10] The terms "psychiatric disabilities" and "mental illness or mental disease" may be used interchangeably with respect to the statutes and regulations at issue in the present case. See *State* v. *March*, supra, 265 Conn. 707 n.13.

that brought him under the jurisdiction of the [b]oard or the need for treatment and medication. Even within the highly structured and supervised maximum security setting, he has been uncooperative with treatment and medication recommendations. As a result, his treatment team has been unable to adequately assess his risk, frustrating their efforts to aid his progress. Additionally, given that [the acquittee] has not resided in the community since 1996, he does not have an established support network available to assist him if discharged. Based on the aforementioned, the [b]oard finds that [the acquittee] cannot currently reside safely in the community and should remain under the jurisdiction of the [b]oard.

"From the preceding facts, the [b]oard concludes that the evidence is clear and convincing that [the acquittee] remains an individual with psychiatric disabilities to the extent that his discharge from the jurisdiction of the [b]oard would constitute a danger to himself or others."

Gusfa testified at the March 12, 2018 court hearing that he had been treating the acquittee for approximately eighteen months. He testified that he would not recommend that the acquittee be transferred from maximum security to a less restrictive setting due to his lack of participation with his treatment team. Gusfa also indicated that the acquittee had "poor" insight into his psychiatric illness and his need for medication and continued treatment. He opined that, given the acquittee's historical risk factors, he would be vulnerable to psychiatric regression and at risk behaviors without a structured environment and intense mental health support. On cross-examination, Gusfa stated that the acquittee presently was diagnosed with bipolar disorder. On redirect examination, Gusfa testified that the acquittee would benefit from psychiatric medication and that his refusal to be medicated constituted an ongoing risk factor. Neither the board nor Gusfa specifically mentioned or referred to the DSM-5.

The court found both the board's report and Gusfa's testimony to be credible. It then made the following findings: "[The] court is particularly taken, but not exclusively taken, by the fact that . . . this was a serious crime to begin with, extremely serious crime. And that since that time and especially since . . . Gusfa's been involved, the—[the acquittee] is minimally involved in treatment. He doesn't participate in the recommended groups; he refuses to meet with the teams. He has poor insight into his mental illness. He refused to take the medication which has been recommended.

"At least in a second altercation with another patient, according to the doctor, which the court credits, [the acquittee] became more than a little confrontational and very aggressive. And he's—while he's okay, he can participate in [a] maximum security setting, he—he can't—[Gusfa] cannot or would not put him in a less secure setting.

"So based upon all those risk factors, the court finds it's clearly—it's clear and convincing evidence that the acquittee is mentally ill. He's mentally ill—[in] that he's got bipolar disorder, most recent episode hypomania, manic, unspecified personality disorder with paranoid narcissistic and antisocial traits."

The question, therefore, is whether the court's finding that the acquittee, at the time of the December 8, 2017 petition to extend his commitment, suffered from a mental illness, as defined by our statutes and regulations, was clearly erroneous when neither the board's report nor the sole witness to testify at the hearing specifically mentioned the DSM-5. We conclude that it was not.[11]

[11] We do note that it would be a better practice for the state to present evidence that an acquittee's diagnosis of a mental illness is based on the current Diagnostic and Statistical Manual of Mental Disorders of the Ameri-

The board conducted its hearing on January 5, 2018, to review the acquittee's status in response to the state's petition and issued its report approximately two weeks later on January 22, 2018. The composition of the board is noteworthy. "The . . . board is a six member autonomous, administrative body within the [D]epartment of [M]ental [H]ealth and [A]ddiction [S]ervices that oversees the involuntary commitment of people found not guilty by reason of mental disease or defect. . . . The board's membership must include a psychiatrist, a psychologist, a probation expert, a layperson, an attorney who is licensed in Connecticut, and a layperson with experience in victim advocacy. General Statutes § 17a-581 (b)." (Citations omitted.) *State* v. *Harris*, supra, 277 Conn. 381 n.5; see also *State* v. *Long*, 268 Conn. 508, 519–20, 847 A.2d 862, cert. denied, 543 U.S. 969, 125 S. Ct. 424, 160 L. Ed. 2d 340 (2004).[12] Under the acquittee statutory scheme, the board possesses general and specific familiarity with all acquittees and is better equipped than the courts to monitor their commitment. *State* v. *Long*, supra, 536.

At the outset of its report, each of the participating board members attested that he or she was present at the hearing, had reviewed the record, and that the report issued to the court was "*based entirely on the record, the law, and the* [*b*]*oard's specialized knowledge and familiarity with the acquittee*." (Emphasis added.) Inherent in these statements is a recognition by the members of the board of the applicable statutes; see General Statutes §§ 17a-580 (7) and 17a-593 (c); regulations; see Regs., Conn. State Agencies § 17a-281 (2) (a)

can Psychiatric Association when seeking to extend a commitment pursuant to § 17a-593 (c).

[12] In the present case, the board acted with five members: "Sheila Hennessey, [an attorney], Cheryl Abrams, M.S., Susan Blair, M.S., Mark Kirschner, Ph.D. and Hassan Minhas, M.D." General Statutes § 17a-581 (g) provides in relevant part that "[a] majority of the members of the board constitutes a quorum for the transaction of business . . . ."

(5); and the case law interpreting those items. As our Supreme Court explained in *State* v. *March*, supra, 265 Conn. 706–709, the applicable statutes and regulations, when read in concert, establish the requirement that the board use the current Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association[13] in determining mental illness. The board, with its expertise and general and specific knowledge of acquittees that furthers the legislative goal of the efficient management of the recommitment process; see *State* v. *Long*, supra, 268 Conn. 536; would be aware of the applicable definition of mental illness. See also *Dyous I*, supra, 307 Conn. 324 (system applicable to acquittees accords central role to board).

In light of the educational and professional backgrounds of the members of the board, and their attestations that the report was based on the controlling law, we disagree with the acquittee that the court's finding of mental illness was clearly erroneous. The detailed information in the board's report, coupled with Gusfa's testimony, support the court's finding that the acquittee suffered from a mental illness despite the absence of a specific reference to the DSM-5. As a general matter, "Connecticut courts have refused to attach talismanic significance to the presence or absence of particular

[13] This manual has been broadly accepted and recognized as "an objective authority on the subject of mental disorders . . . ." (Internal quotation marks omitted.) *Fuentes* v. *Griffin*, 829 F.3d 233, 249 (2d. Cir. 2016). We note that the diagnoses set forth in the board's report and mentioned by Gusfa are found in the DSM-5. See American Psychiatric Assn., Diagnostic and Statistical Manual of Mental Disorders (5th Ed. 2013) pp. 126–27 (bipolar I disorder, most recent episode hypomanic in full remission); id., 490–91 (alcohol use disorder in sustained remission in controlled environment); id., 509–10 (cannabis use disorder in sustained remission in controlled environment); id., 684 (unspecified personality disorder); id., pp. 841–42, 844, 850, 856 (listing of diagnostic codes, including antisocial personality disorder, narcissistic personality disorder and paranoid personality disorder). We further note that, in the past, the acquittee has conceded the fact that he suffered from a mental illness. See *Dyous II*, supra, 153 Conn. App. 281.

words or phrases." *State* v. *Janulawicz*, 95 Conn. App. 569, 576 n.6, 897 A.2d 689 (2006); see also *State* v. *Damone*, supra, 148 Conn. App. 166–67 (failure to use "magic words" did not render finding that acquittee suffered from mental illness clearly erroneous (internal quotation marks omitted));[14] *State* v. *Peters*, 89 Conn. App. 141, 146, 872 A.2d 532 (court's failure to use term "psychiatric disabilities" before finding that acquittee's commitment should be extended did not warrant reversal under plain error doctrine where court clearly made findings regarding condition of acquittee that met definition of that term), cert. denied, 274 Conn. 918, 879 A.2d 895 (2005). Accordingly, we conclude that the court's finding of mental illness was not clearly erroneous.

Next, we turn to the acquittee's contention that the court's finding that he would present a danger to himself or others as a result of his mental illness if released from the jurisdiction of the board was clearly erroneous. Specifically, the acquittee contends that the court placed too much emphasis on the original incident in 1983 and that the evidence, as a whole, did not rise to level necessary to extend his commitment. After reviewing the totality of the record, we cannot conclude that the court's finding of dangerousness was clearly erroneous.

[14] In *State* v. *Damone*, supra, 148 Conn. App. 162–63, the trial court, in concluding that the state had met its burden of proof to extend the acquittee's commitment, concluded that, although the acquittee was clinically stable in his controlled environment, "if removed from that controlled environment, [the acquittee] is at a great risk to mentally relapse." (Internal quotation marks omitted.) On appeal, the acquittee argued that the state had failed to prove that his mental illness may become active with a reasonable degree of medical certainty. Id., 166. This court disagreed, noting first that formulaic or talismanic words were unnecessary under our law. Id., 167. We then concluded that the evidence supported the finding of a "great risk [of] relapse" and therefore the court's finding of mental illness was not clearly erroneous. (Internal quotation marks omitted.) Id. This reasoning applies to the present case, where the evidence, taken as a whole, supports the finding of mental illness, even in the absence of a specific reference to the DSM-5.

In *State* v. *March*, supra, 265 Conn. 709, our Supreme Court interpreted the phrase "[d]anger to self or others . . . [to mean] the risk of imminent physical injury to others or self, including the risk of loss or destruction of the property of others." (Citation omitted; footnote omitted; internal quotation marks omitted.). See *State* v. *Kelly*, supra, 95 Conn. App. 35; see also *State* v. *Damone*, supra, 148 Conn. App. 170 n.15 ("The regulations define danger to self or others as the risk of imminent physical injury to others or self, and also includes the risk of loss or destruction of the property of others. . . . Imminent is defined as ready to take place; esp: hanging threateningly over one's head . . . ." (Citation omitted; internal quotation marks omitted.)).

We iterate that the determination of whether an acquittee posed a danger to himself or others such that his commitment to the jurisdiction of the board should be extended presents a question of fact subject to the deferential clearly erroneous standard of review. See *State* v. *March*, supra, 265 Conn. 709, 711. A finding is clearly erroneous when there is no evidence in the record to support it or when there is some evidentiary support but nonetheless the reviewing court, on the entire evidence, is left with definite and firm conviction that a mistake has been committed. See, e.g., *State* v. *Maskiell*, supra, 100 Conn. App. 521. Finally, we are mindful of our limited role in this process. "In applying the clearly erroneous standard to the findings of a trial court, we keep constantly in mind that our function is not to decide factual issues de novo. Our authority . . . is circumscribed by the deference we must give to [the] decisions of the [trial court], who is usually in a superior position to appraise and weigh the evidence." (Internal quotation marks omitted.) *State* v. *Jacob*, supra, 69 Conn. App. 680.

In making the factual finding regarding dangerousness, the trial court balances the different, and sometimes competing, considerations at issue. "[T]he goals of a treating psychiatrist frequently conflict with the goals of the criminal justice system. . . . While the psychiatrist must be concerned primarily with therapeutic goals, the court must give priority to the public safety ramifications of releasing from confinement an individual who has already shown a propensity for violence. As a result, the determination of dangerousness in the context of a mental status hearing reflects a societal rather than a medical judgment, in which the rights and needs of the defendant must be balanced against the security interests of society. . . . The awesome task of weighing these two interests and arriving at a decision concerning release rests finally with the trial court." (Internal quotation marks omitted.) *State* v. *March*, supra, 265 Conn. 712; see *State* v. *Jacob*, supra, 69 Conn. App. 677; see also *State* v. *Harris*, supra, 277 Conn. 384 (court not bound by board's report but considers additional evidence and makes own finding as to acquittee's mental condition); *State* v. *Putnoki*, 200 Conn. 208, 221, 510 A.2d 1329 (1986) (determination of dangerousness in context of mental status hearing reflects societal, rather than medical, judgement). Most importantly, "[*t*]*he ultimate determination of mental illness and dangerousness is a legal decision . . . in which the court may and should consider the entire record available to it, including the* [*acquittee's*] *history of mental illness, his present and past diagnoses, his past violent behavior, the nature of the offense for which he was prosecuted, the need for continued medication and therapy, and the prospects for supervision if released*." (Citation omitted; emphasis added; internal quotation marks omitted.) *State* v. *Damone*, supra, 148 Conn. App. 171; see also *State* v. *Jacob*, supra, 681 (although court may choose to attach special weight to testimony of experts at hearing, ultimate determination of mental illness and dangerousness is legal decision).

Here, the court credited both the board's report and Gusfa's testimony. The board specifically found that the acquittee has a lengthy psychiatric history with intermittent episodes of assaultive and aggressive behavior, treatment noncompliance and two escapes from treatment settings. The board noted some recent improved participation in his treatment group, but also commented on his resistance to attempts to encourage and motivate him to transfer to a less restrictive hospital setting. The board also observed that, despite his many years of treatment, the acquittee demonstrated poor insight into his mental illness, or the need for treatment and medication. It also stated that even in the highly structured supervised maximum security setting, the acquittee had not cooperated with treatment and medication recommendations, frustrating efforts by his treatment team to aid his progress. Finally, the board indicated that the acquittee lacked an established support network in the community. In addition to its general acceptance of the board's report, the court, in its oral decision, referenced many of the board's specific comments in support of its finding that the acquittee was a danger to himself or others.

Additionally, the board noted in its report that, in 2013, the acquittee had made a "veiled threat" directed at one of his treating psychiatrists and left a "concerning voicemail" for the chief executive officer of Connecticut Valley Hospital. Around that time, the acquittee also "lunged at" and "picked up a side table and threw it at" a nurse after being offered prescribed medication. After being placed in restraints, the acquittee threatened an on call psychiatrist and the unit director. After being transferred to a different unit, the acquittee did not act in an aggressive manner, but he continued to refuse to meet with his treatment team as a whole, resulting in the team's inability to fully assess his risk and protective factors.

There was also evidence in the board's report that the acquittee's poor acceptance and understanding of his mental illness contributed to the actions regarding the hijacking of the bus and that his risk factors include alcohol and marijuana abuse. The report also indicated that the acquittee "has a history of failing [c]onditional [r]elease, escape from the hospital, medication noncompliance and deceptiveness about his medication noncompliance." The report noted that the acquittee's psychiatric treatment has been largely unsuccessful and that he continued to demonstrate a paranoid world view. Although the acquittee was not considered to be an acute risk in his current highly structured maximum security environment, his oppositional attitude and history of escape hindered the acquittee's ability to move to a less secure setting. Gusfa opined to the board that the acquittee "was capable of impulsive behavior without any regard to his mental health needs in a less structured setting," and that he "did not have much confidence that [the acquittee] would stay allied with therapeutic supports in a [less restrictive environment]." Gusfa also expressed a concern that the effects of additional stressors, such as substance abuse, could leave the acquittee more prone to acute psychiatric decompensations. In sum, Gusfa believed that the acquittee "had not yet attained an adequate level of clinical stability to permit his return to the community."

The court properly considered the totality of the evidence in finding that the acquittee presented a danger to himself or others if released from the jurisdiction of the board. See *State* v. *Putnoki*, supra, 200 Conn. 221; *State* v. *Jacob*, supra, 69 Conn. App. 688. That calculus included a review of the acquittee's lengthy struggle with mental illness,[15] his failure to cooperate with treatment and medication recommendations and his past

[15] Our Supreme Court has stated: "It is true that the court should take into consideration the acquittee's past and present diagnoses in assessing dangerousness for purposes of a § 17a-593 discharge hearing." *State* v. *March*, supra, 265 Conn. 716.

violent behaviors and mental health decompensations when outside of a maximum security setting. "[I]t also comports with common sense to conclude . . . that someone whose mental illness was sufficient to lead him to commit a dangerous crime, and whose mental illness demonstrably has persisted despite years of intensive treatment, is someone whose prospective release raises a special concern for public safety." *Dyous I*, supra, 307 Conn. 329. The evidence supports the court's finding that, if the acquittee were to be released from the jurisdiction of the board, he would pose a danger to himself or others. *State* v. *Damone*, supra, 148 Conn. App. 175. After reviewing the totality of the evidence, we conclude that the court's finding of dangerousness was not clearly erroneous. The defendant's claim, therefore, must fail.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ROBERT H.*
(AC 36742)
(AC 37544)

Lavine, Devlin and Sheldon, Js.

Syllabus

Convicted of two counts of the crime of risk of injury to a child arising out of two separate acts of masturbation in the presence of the minor victim, and judgment revoking his probation, the defendant appealed. The defendant claimed that the evidence was insufficient to support his conviction as to one of the counts of risk of injury because the only evidence of the second incident was two statements that he made to the police, which were admitted without objection at trial. The victim had testified at trial concerning only one such incident. The defendant claimed that the common-law corpus delicti rule, or corroboration rule, precluded

* In accordance with our policy of protecting the privacy interests of the victims of the crime of risk of injury to a child, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

his confession from being used as the only evidence of the second incident because there was no substantial independent evidence tending to establish the trustworthiness of that confession. This court affirmed the conviction. The defendant, on the granting of certification, appealed to our Supreme Court, which reversed the judgment of this court and remanded the case to this court with direction to consider fully the merits of the defendant's corpus delicti claim in light of its decision in *State* v. *Leniart* (333 Conn. 88). *Held* that the defendant could not prevail on his corpus delicti claim that his confession constituted insufficient evidence for the jury to conclude that he had masturbated in the presence of the victim on more than one occasion, as there was substantial evidence to corroborate the defendant's written statement, which was against his penal interest, that he had masturbated at least twice in the presence of the victim, including that the defendant voluntarily went to the police and agreed in writing to a videotaped interview with officers and to waive his constitutional rights when he gave a signed, written statement to the police, the defendant's statement closely paralleled the victim's testimony regarding the defendant's masturbation in her bedroom, there were seven stains containing the defendant's DNA on the bottom of the victim's bedspread and testimony was presented at trial that semen is water soluble and the defendant tried to wipe the semen with a wet cloth and the bedspread had been laundered two or three weeks before the police seized it.

Argued February 20—officially released June 23, 2020

Procedural History

Substitute information, in the first case, charging the defendant with three counts of the crime of risk of injury to a child and two counts of the crime of sexual assault in the first degree, and information, in the second case, charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Hartford, where the first case was tried to the jury before *Suarez*, *J.*; verdict of guilty of two counts of risk of injury to a child; thereafter, the defendant was presented to the court in the second case on a plea of guilty; judgment of guilty in accordance with the verdict and judgment revoking probation, from which the defendant filed separate appeals to this court, *Lavine* and *Sheldon*, *Js.*, with *Flynn*, *J.*, dissenting, which affirmed the trial court's judgments, and the defendant, on the granting of certification, appealed to our

Supreme Court, which reversed the judgment of this court and remanded the case to this court for further proceedings. *Affirmed.*

Naomi T. Fetterman, for the appellant (defendant).

Bruce R. Lockwood, supervisory assistant state's attorney, with whom, on the brief, were *Lisa Herskowitz*, former senior assistant state's attorney, *Gail P. Hardy*, state's attorney, and *John F. Fahey*, supervisory assistant state's attorney, for the appellee (state).

Opinion

LAVINE, J. This risk of injury case returns to this court on remand from our Supreme Court; see *State* v. *Robert H.*, 333 Conn. 172, 175, 214 A.3d 343 (2019) (*Robert II*); directing this court to consider fully the merits of the "corpus delicti claim" raised by the defendant, Robert H., in his direct appeal. See *State* v. *Robert H.*, 168 Conn. App. 419, 422–23, 146 A.3d 995 (2016) (*Robert I*), rev'd, 333 Conn. 172, 214 A.3d 343 (2019). Our Supreme Court further directed this court to review the defendant's corpus delicti claim pursuant to its decision in *State* v. *Leniart*, 333 Conn. 88, 97, 215 A.3d 1104 (2019). We have considered the defendant's corpus delicti claim as directed and conclude that the judgments of conviction should be affirmed.

The following procedural history provides the context for this opinion. In 2013, the defendant was charged in a long form information with two counts of sexual assault in the first degree and one count of risk of injury to, or impairing the morals of, a child for a sexual encounter that allegedly took place between the defendant and the minor victim in the kitchen of the victim's home (kitchen incident). *Robert I*, supra, 168 Conn. App. 422–23. He also was charged in counts four and five of the long form information with risk of injury to, or impairing the morals of, a child (risk of injury) in violation of General Statutes § 53-21 (a) (1).[1] Counts four and five alleged two instances in which the defendant masturbated in the presence of the victim.[2] The charges were tried to the jury, which found the defendant not guilty of the three charges related to the kitchen incident. The jury, however, found the defendant guilty of the two risk of injury charges in violation of § 53-21 (a) (1), arising from the defendant's having masturbated twice in the presence of the victim.[3] Id., 426. After the jury found the defendant guilty, he pleaded guilty to a charge of violation of probation that had been alleged in a separate file. The court sentenced

[1] General Statutes § 53-21 (a) provides in relevant part: "Any person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child . . . shall be guilty of . . . a class C felony . . . ."

[2] Counts four and five of the long form information are identical and allege in relevant part: "The said Senior Assistant State's Attorney further accuses **Robert [H.]** of the crime of **INJURY OR RISK OF INJURY TO, OR IMPAIRING MORALS OF A CHILD**, in violation of . . . General Statutes § 53-21 (a) (1) and alleges that on unspecified dates between September, 2009 and March 5, 2011, at or near [the victim's address] . . . the defendant did an act likely to impair the health or morals of a child under the age of sixteen, identified as the person listed in State's Exhibit 1." (Emphasis in original.) Exhibit 1 states the name of the victim, her date of birth, and town of residence.

[3] The defendant moved for a judgment of acquittal at the close of the state's case-in-chief, at the close of evidence, and again at sentencing. The defendant argued that there was no evidence to support a finding that he masturbated in the victim's presence a second time, as the victim had testified to only one such incident. He further argued that the state, therefore, could not establish that she was harmed or affected by the alleged second incident if she was not aware of it. *Robert I*, supra, 168 Conn. App. 425. The state responded by arguing that risk of injury does not require that the child be aware of the defendant's acts, only that the defendant's conduct was of a nature that it was likely to impair the health or morals of a child. Id., 425–26. The court denied each of the defendant's motions for judgment of acquittal, stating that there was sufficient evidence by which the jury could find that the defendant had masturbated in the victim's presence on more than one occasion. Id., 426.

the defendant on all three charges to a total effective sentence of twenty years of incarceration. Id., 421.

The defendant appealed to this court, claiming that there was insufficient evidence to support a guilty verdict on a second charge of risk of injury for masturbating in the presence of the victim. Id., 421. He argued that "the only evidence presented at trial to support the jury's finding that he had masturbated in [the victim's] presence on more than one occasion were two statements he made to [the] police, which were admitted into evidence against him without objection at trial. The defendant [continued] that such evidence was insufficient to support his conviction on a second charge of risk of injury because, under the corpus delicti rule, also referred to as the corroboration rule, there was not substantial independent evidence tending to establish the trustworthiness of his confession to a second act of masturbation in the [victim's presence]." Id., 421–22. In response, the state argued that "the defendant's [corpus delicti] claim [was] unreviewable because the corroboration rule is a rule of evidence governing the admissibility of oral and written statements, and the defendant never challenged the admissibility of his statements [to the police] at trial." Id., 422.

In deciding whether to review the defendant's claim in *Robert I*, the majority stated that this court recently had held, "in *State* v. *Leniart*, 166 Conn. App. 142, 152–53, 140 A.3d 1026 (2016) [rev'd in part, 333 Conn. 88, 215 A.3d 1104 (2019)],[4] that the corroboration rule is solely a rule of admissibility [and] agree[d] with the

[4] Judge Flynn dissented in part in *State* v. *Leniart*, supra, 166 Conn. App. 228. He agreed "with the majority that there was sufficient independent evidence that the defendant intentionally caused the death of the victim, corroborating the extrajudicial confession of the defendant, and thus by sufficient evidence establishing the necessary elements of the crime of murder . . . . [He] dissented in part because [he] did not agree that the corpus delicti rule was merely evidentiary in that murder case." (Citation omitted.) *Robert I*, supra, 168 Conn. App. 433.

state that the defendant [could not] raise his unpreserved [corpus delicti] claim as part of his claim of insufficient evidence." (Footnote added.) *Robert I*, supra, 168 Conn. App. 422. The majority, therefore, concluded that it was not necessary "to decide whether there was substantial independent evidence tending to establish the trustworthiness of the defendant's confession." Id. The majority considered the defendant's "unobjected-to statements in the light most favorable to the state in evaluating his . . . claim of evidentiary insufficiency." Id. The majority ultimately concluded that the "defendant's statements that he masturbated in the [victim's presence] 'at least twice' provided a sufficient evidentiary basis for the jury reasonably to conclude that he was guilty beyond a reasonable doubt of both counts of risk of injury of which he was convicted"; id.; and affirmed the defendant's conviction.[5] Id., 432.

Our Supreme Court granted the defendant's petition for certification to appeal limited to the question of whether "the Appellate Court properly conclude[d] that the corpus delicti rule is merely a rule of admissibility, in determining that there was sufficient evidence to sustain the defendant's second conviction of risk of injury to a child . . . ." *State* v. *Robert H.*, 323 Conn. 940, 151 A.3d 845 (2016). After the appeal was argued, our Supreme Court issued a per curiam decision, answering the question by stating that "our corpus delicti rule is a hybrid evidentiary-substantive rule that implicates a defendant's fundamental right not to be convicted in the absence of evidence sufficient to

[5] Judge Flynn wrote a dissenting opinion in *Robert I* as he did in *Leniart*. See footnote 4 of this opinion. In *Robert I*, he opined that corpus delicti claims implicate a defendant's substantive due process rights and, therefore, are reviewable on appeal even if not preserved at trial, and that the evidence at trial was not sufficient to corroborate the reliability of the defendant's confession as to a second incident of sexual misconduct. See *Robert I*, supra, 168 Conn. App. 435–38.

establish every essential element of the charged crime beyond a reasonable doubt, and, therefore, even unpreserved corpus delicti claims are reviewable on appeal. See *State* v. *Leniart*, supra, 333 Conn. 110." *Robert II*, supra, 333 Conn. 175. The Supreme Court, therefore, reversed this court's judgment in *Robert I* and "remand[ed] the case to [this] court for full consideration of the merits of the defendant's corpus delicti claim." Id.

On November 19, 2019, this court issued an order stating that the parties may file simultaneous supplemental briefs, addressing the impact of *State* v. *Leniart*, supra, 323 Conn. 88, on the defendant's appeal. In his supplemental brief, the defendant claims that "the evidence was insufficient to sustain a conviction on a second charge of risk of injury since, under the corpus delicti rule, there was not any evidence, much less substantial, independent evidence, tending to establish the trustworthiness of his confession to a second act of masturbation in the presence of [the victim]."

Before considering the evidence before the jury, we set forth the applicable principles of law. A criminal defendant has a constitutional right not to be convicted of a crime "except upon sufficient proof . . . to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." (Internal quotation marks omitted.) *State* v. *Adams*, 225 Conn. 270, 275 n.3, 623 A.2d 42 (1993). "In reviewing a sufficiency of the evidence claim, we apply a two part test. First we construe the evidence in the light most favorable to sustaining the verdict. Second we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [fact finder] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . . This court cannot substitute its own judgment for that of the [fact finder] if there is sufficient evidence to support the [fact finder's] verdict . . . .

We ask . . . whether there is a reasonable view of the evidence that supports the [fact finder's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Watson*, 195 Conn. App. 441, 445, 225 A.3d 686, cert. denied, 335 Conn. 912, A.3d (2020).

"[W]e do not sit as the seventh juror when we review the sufficiency of the evidence . . . rather, we must determine, in the light most favorable to sustaining the verdict, whether the totality of the evidence, including reasonable inferences therefrom, supports the jury's verdict of guilt beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Miles*, 97 Conn. App. 236, 240, 903 A.2d 675 (2006).

We now turn to *State* v. *Leniart*, supra, 333 Conn. 88. The corpus delicti rule "generally prohibits a prosecutor from proving the [fact of a transgression] based solely on a defendant's extrajudicial statements." (Internal quotation marks omitted.) Id., 97. Our Supreme Court now has concluded that "the corpus delicti rule is a hybrid rule that not only governs the admissibility of confession evidence but also imposes a substantive requirement that a criminal defendant may not be convicted solely on the basis of a naked, uncorroborated confession." Id., 110. The rule "not only governs the admission of confession evidence but also sets the conditions for obtaining a conviction." Id., 101.

"[T]he general rule is that the corpus delicti cannot be established by the [extrajudicial] confession of the defendant unsupported by corroborative evidence. . . . There are cases which hold in effect that it must be established by evidence independent of the defendant's confession and that without such proof evidence of the confession is inadmissible." (Internal quotation marks omitted.) Id., 111; see *State* v. *Doucette*, 147 Conn. 95, 98–100, 157 A.2d 487 (1959), overruled in part by *State* v. *Tillman*, 152 Conn. 15, 20, 202 A.2d 494 (1964); *State* v. *LaLouche*, 116 Conn. 691, 693, 166 A. 252 (1933), overruled in part by *State* v. *Tillman*, 152 Conn. 15, 20, 202 A.2d 494 (1964).

In keeping with the modern trend, our Supreme Court previously reduced the burden the corpus delicti rule imposes on the state in prosecuting crimes. See *State* v. *Leniart*, supra, 333 Conn. 112. In *State* v. *Tillman*, 152 Conn. 15, 20, 202 A.2d 494 (1964), the court "departed from the traditional rule that the state must establish, by independent evidence, both that an injury or loss occurred and that the loss was feloniously caused. . . . [T]he corpus delicti that must be established by independent evidence encompasses only the former element, namely, the specific kind of loss or injury embraced in the crime charged." (Footnotes omitted.) *State* v. *Leniart*, supra, 112. The court again, in *State* v. *Harris*, 215 Conn. 189, 193–94, 575 A.2d 223 (1990), modified the rule as it applies to "crimes, such as driving under the influence, that proscribe certain undesirable conduct but do not necessarily entail any particular injury or loss." *State* v. *Leniart*, supra, 113. "[F]or crimes of that sort, the state need not establish the corpus delicti of the crime through extrinsic evidence . . . [it] need only introduce substantial independent evidence [that] would tend to establish the trustworthiness of the [defendant's] statement." (Internal quotation marks omitted.) Id. In *State* v. *Hafford*, 252 Conn. 274, 317, 746 A.2d 150, cert. denied, 531 U.S. 855, 121 S. Ct. 136, 148 L. Ed. 2d 89 (2000), our Supreme Court "held that this trustworthiness rule set forth in *Harris*, also known as the corroboration rule, now applies to all types of crimes, not only those offenses that prohibit conduct and do not result in a specific loss or injury. In other words, post-*Hafford*, a confession is now sufficient to establish the corpus delicti of any crime, without independent extrinsic evidence that a crime was committed, as long as there is sufficient reason to conclude that the confession is reliable." (Internal quotation marks omitted.) *State* v. *Leniart*, supra, 113.

To determine whether there was substantial, independent evidence to corroborate the defendant's confession that he twice masturbated in the presence of the victim requires us to examine all of the evidence presented at trial.[6] At the time of the alleged sexual abuse, the victim was a ten or eleven year old, intermediate school student. She was thirteen years old when she testified at trial. She lived with her older brother and her mother, who was romantically involved with the defendant, who spent time in the victim's home. The victim's bedroom was adjacent to her mother's bedroom and was connected to it by a doorway.

During her testimony, the victim was able to recall two specific incidents of a sexual nature that transpired between her and the defendant. During one incident, the victim was lying on her bed watching television when the defendant entered her bedroom, took out his penis, masturbated, and ejaculated onto her bed. After the defendant ejaculated, he wet a cloth and "tried to rub [the semen] off." The second incident took place after the first and occurred in the kitchen. During the kitchen incident, the victim, dressed in her pajamas, was bending over when the defendant approached her from behind and pulled down her pajama bottom. He placed his penis in her "butt" and penetrated her vaginally or anally. The victim did not tell her mother about the incidents that occurred between her and the defendant because she was scared. Although the victim testified that something unusual had occurred between her and the defendant on more than one occasion, at trial she could recall only the two events just described.

The kitchen incident took place approximately three weeks before the victim disclosed the defendant's abuse to a school friend, K, in March, 2011. K wrote a note about the victim's disclosure to one of their teachers,

[6] We undertake a more extensive review of the evidence than was done in *Robert I.*

Gail Jordan, who reported the alleged abuse to a school counselor. The next day, the victim's counselor, Karen Goldman, spoke with the victim, who shared with her the defendant's sexual abuse. Because she is a mandated reporter,[7] Goldman reported the alleged abuse to the Department of Children and Families (department). On the day the department received the complaint, Nina Bentham, a department investigator, reported the complaint to Detective Beth Leger of the Bloomfield Police Department, with whom the department had a working relationship. That evening, Bentham and Leger together went to the victim's home, where the defendant was present. Leger spoke to the victim's mother privately and secured her permission to seize a fitted bedsheet and bedspread from the victim's bed.

Subsequently, the victim was examined at Connecticut Children's Medical Center on March 10, 2011. On March 14, 2011, the victim also was examined by Audrey Courtney, a pediatric nurse practitioner at the Children's Advocacy Center at St. Francis Hospital and Medical Center (children's center). Courtney made a written report of her examination, which was placed into evidence. Richard Cousins, an inspector in the state division of criminal justice, obtained a buccal swab from inside the victim's cheek for DNA testing. Erin Byrne, a forensic interviewer at the children's center, also authored a report that was put into evidence. Byrne's interview of the victim was videotaped and shown to the jury.

Leger telephoned the defendant to arrange a meeting at the Bloomfield police station. At that meeting on April 7, 2011, the defendant signed a consent to search form giving the police permission to take a buccal swab from the inside of his cheek for DNA testing. Leger also asked the defendant to submit to another interview.

[7] Teachers and school counselors, among others, are mandated reporters of suspected child abuse. See General Statutes § 17a-101 (b).

The bedclothes Leger collected from the victim's bed were transferred to the state forensic laboratory by Madison W. Bolden, Jr., a Bloomfield police officer. Jane Codraro, a forensic biologist at the state forensic laboratory, testified about her examination of the blue fitted bedsheet and the bedspread Leger removed from the victim's bed. Codraro found stains on both the sheet and bedspread. She used a screening test known as acid phosphatase to detect the presence of semen on both the sheet and bedspread. She found no evidence of semen on the bedsheet, but there were approximately seven stains containing semen in a one and one-half feet square area on the bedspread at the foot of the bed. Codraro was able to extract cellular material from one of the bedspread stains that indicated the presence of spermatozoa. Codraro sent the cellular material to the DNA section of the laboratory for further testing. The defendant's DNA was found in the cellular material. Codraro also testified that semen is water soluble and could be removed by washing.

On May 17, 2011, the defendant voluntarily went to the West Hartford police station where he was interviewed by Leger and Frank Fallon, then a sergeant in the West Hartford Police Department.[8] Fallon presented the defendant with a waiver of rights form that the defendant read and signed. Fallon and Leger spent approximately four hours interviewing the defendant in a room approximately eight feet by eight feet,[9] but they did not spend the entire time discussing the victim's allegations.[10] Both Fallon and Leger testified that a discussion of the victim's allegations did not begin until the defendant spoke the word "enticement." Leger

[8] Fallon testified that it is common practice for police departments in the Greater Hartford area to assist one another in investigations.

[9] The defendant's entire interview was video recorded.

[10] Fallon testified about the training police officers undergo to investigate and speak with suspects in crimes of sexual abuse of young children. The police seek to create a comfortable environment for an individual to speak about sensitive allegations.

testified that the defendant stated that he had been enticed by the victim when he was lying on her mother's bed from where he could see the victim lying on her bed masturbating. The defendant began masturbating and at some point ended up near the victim's bed masturbating until he ejaculated. He also stated that it was possible that the victim had touched his penis. The defendant steadfastly denied that he ever penetrated the victim. He, however, admitted that he masturbated twice near the victim's bed while she was in it. The defendant became emotional, stating that he knew what he had done was wrong, and that, as an adult, he knew that it should not have happened.

During the interview, Leger represented to the defendant that the police had certain evidence, namely the victim's underwear containing his semen, which actually they did not have. Leger explained that that interview technique is used by police officers to elicit a truthful response. The police may get a very clear objection to the evidence because the suspect knows that it does not exist, or the technique may help the suspect to be truthful.

At no time during the interview did the defendant invoke his right to remain silent, state that he wanted an attorney or otherwise invoke his constitutional rights. He appeared to Leger to be coherent, and not under the influence of alcohol, drugs, or medicines. At the conclusion of the interview, the defendant agreed to give Leger a written statement summarizing what he had stated during the interview. He dictated his statement to Leger, read it, swore to its truthfulness, and signed it. After he signed the statement, the defendant left the West Hartford police station. He was not under arrest.

The final forty or so minutes of the defendant's recorded interview was played for the jury. His written statement was read to the jury and placed into evidence. The defendant's confession, which is the basis of his corpus delicti claim, states as follows: "I . . . do hereby make the following statement of my own free will, without fear, threats or promises of any kind, and knowing that the same may be used in court against me, and that false statements are punishable by law.

"Either late January or February, 2011, I was visiting my girlfriend . . . at her apartment . . . . I was in [her] bedroom. [She] was in the living room and had smoked weed. I was lying in [her] bed and could see [the victim] in her bedroom, lying in her bed, with her hands inside her pants. She was masturbating. She knew that I could see her, but it was like she wanted me to see her.

"After watching her masturbate for about [fifteen] minutes, I went to [the victim's] room. I stood about two or three feet away from her bed, and with my clothes on, pulled my penis out and started to masturbate myself.

"She seemed like she was happy with me doing that. I ejaculated in her general direction, but not on top of her. I don't know if she came or not.

"This same thing happened *at least twice*, where I masturbated in front of her in her room, and it's probably how my semen got on her bed or clothes. I never penetrated her with my penis or anything else. I think she might have touched my penis on one of those times, right after I ejaculated, which might explain any of my semen in her pants.

"I've had a problem with resisting temptation like this for quite a while. I have been attending group therapy sessions, but don't think that program is working for me. I believe I need more help than that, because I don't want to continue doing these things.

"I've read the above statement consisting of one page and it is true and correct. . . ." (Emphasis added.)

At the conclusion of evidence, the state argued to the jury that the sexual assaults alleged in counts one and two and risk of injury alleged in count three related to the kitchen incident. The risk of injury counts alleged in counts four and five were predicated on the two incidents during which the defendant masturbated in the victim's presence. *Robert I*, supra, 168 Conn. App. 426. The state specifically argued that the defendant had confessed to having masturbated in the victim's presence on two occasions. Id. In his closing argument, defense counsel argued that the victim's story changed each time she told it. Id.

On appeal, the defendant claims that there was no substantial independent evidence to establish the trustworthiness of his confession that he twice masturbated in the presence of the victim. Under the corroboration rule, the state need only "introduce substantial independent evidence [that] tend[s] to establish the trustworthiness of the [defendant's] statement[s]." (Internal quotation marks omitted.) *State* v. *Leniart*, supra, 333 Conn. 119. The substantial evidence standard is met if the record provides a "substantial basis of fact from which the fact in issue can be reasonably inferred." (Internal quotation marks omitted.) *Adriani* v. *Commission on Human Rights & Opportunities*, 220 Conn. 307, 315, 596 A.2d 426 (1991).

On the basis of our review of the record, we conclude that it contains substantial independent evidence to corroborate the trustworthiness of the defendant's confession. The defendant's sworn written statement that he masturbated "at least twice" in the presence of the victim is a statement against his penal interest, which has been recognized as indicative of trustworthiness by the United States Supreme Court. See *United States* v. *Harris*, 403 U.S. 573, 583, 91 S. Ct. 2075, 29 L. Ed. 2d 723 (1971) (admission of crime, like admission against proprietary interests, carries indicia of credibility). Our appellate courts and code of evidence reflect this rule of trustworthiness.

In addressing the admissibility of a coconspirator's confession to his postconviction cellmate, this court has looked to § 8-6 of the Connecticut Code of Evidence, which concerns hearsay. See *State* v. *Collins*, 147 Conn. App. 584, 590, 82 A.3d 1208 (confession not against penal interest), cert. denied, 311 Conn. 929, 86 A.3d 1057 (2014). See Conn. Code Evid. § 8-6 (4) ("A trustworthy statement against penal interest that, at the time of its making, so far tended to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. In determining the trustworthiness of a statement against penal interest, the court shall consider (A) the time the statement was made and the person to whom the statement was made, (B) the existence of corroborating evidence in the case, and (C) the extent to which the statement was against the declarant's penal interest.").

"The against [penal] interest exception is not limited to a defendant's direct confession of guilt. . . . It applies as well as to statements that tend to subject the speaker to criminal liability. . . . The rule encompasses disserving statements by a declarant that would have probative value in a trial against the declarant." (Citations omitted; internal quotation marks omitted.) *State* v. *Bryant*, 202 Conn. 676, 695, 523 A.2d 451 (1987).

In the present case, the evidence demonstrates that the defendant voluntarily went to the West Hartford Police Department, agreed in writing to a videotaped interview with two police officers, and again agreed in writing to waive his constitutional rights when he gave a signed, written statement to Leger, the detective investigating the report of the defendant's abuse. The defendant attested to the truthfulness of his statement that he masturbated at least twice in the victim's presence. His statement closely parallels the victim's testimony during which she described the defendant's masturbating in her bedroom. The victim's testimony lends credibility to the defendant's statement that he masturbated at least twice in her presence. Seven stains were found on the bedspread that covered the bottom portion of the bed. Laboratory analysis detected the presence of the defendant's DNA on the bedspread, confirming that the defendant had ejaculated on to the victim's bed. Codraro testified that semen is water soluble. The victim testified that the defendant tried to wipe the semen from her bedspread with a wet cloth and that the bedspread had been laundered two or three weeks before Leger seized it. This evidence strongly corroborates the defendant's statement that he had masturbated in the victim's presence at least twice.

For the foregoing reasons, we conclude that there was substantial evidence to corroborate the defendant's written statement that he had masturbated at least twice in the presence of the victim. The defendant's corpus delicti claim, therefore, fails.

The judgments are affirmed.

In this opinion the other judges concurred.

SCLAFANI PROPERTIES, LLC *v.* SPORT-N-LIFE DISTRIBUTING, LLC, ET AL.
(AC 40066)

Prescott, Bright and Bishop, Js.

Syllabus

The plaintiff sought to recover damages from the defendants for breach of a commercial lease, and the matter was referred for a hearing to an attorney trial referee, who recommended judgment in favor of the plaintiff. In her report, the referee noted that the plaintiff had offered itemized exhibits into evidence and testimony that the defendants had failed to make certain rental payments, to pay real estate taxes and hazard insurance premiums. The referee, however, concluded that the plaintiff failed to provide evidence regarding the real estate taxes or insurance premiums. The plaintiff filed an objection to the referee's report, which the trial court denied, and, thereafter, the court rendered judgment for the plaintiff in accordance with the referee's report. Subsequently, the plaintiff filed a motion for attorney's fees, in which it sought $27,904.12. The court granted the motion but awarded the plaintiff only $6391.63, and the plaintiff appealed to this court. *Held*:

1. The trial court improperly accepted the attorney trial referee's findings of fact with respect to the unpaid real estate taxes and failed to include in its judgment an amount for unpaid real estate taxes; the record clearly reflected both testimonial and documentary evidence that supported the plaintiff's claim that the defendants owed unpaid real estate taxes.
2. The trial court abused its discretion in determining its award of attorney's fees on the basis of the amount of damages awarded to the plaintiff: using the amount in controversy in determining a reasonable award of attorney's fees is improper and the court indicated in its articulation that its award of attorney's fees was linked to the amount of damages awarded to the plaintiff, and, accordingly a new hearing to determine such fees was ordered.

Argued March 9—officially released June 23, 2020

Procedural History

Action to recover damages for breach of a lease, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, Housing Session, where the matter was referred to an attorney trial referee, who filed a report recommending judgment in favor of the plaintiff; thereafter, the court, *Rodriguez, J.*, denied the plaintiff's objection to the acceptance of the report and rendered judgment for the plaintiff; subsequently, the court granted in part the plaintiff's motion for attorney's fees, from which the plaintiff appealed to this court. *Affirmed in part*; *reversed in part*; *further proceedings*.

Peter V. Lathouris, with whom were *Victor Andreou* and, on the brief, *Michael P. Longo, Jr.*, for the appellant (plaintiff).

Mario L. DeMarco, for the appellees (defendants).

Opinion

BISHOP, J. The plaintiff, Sclafani Properties, LLC, appeals from the judgment of the trial court awarding it damages and attorney's fees for the failure of the defendants, Sport-N-Life Distributing, LLC (lessee), and its president, Gilbert Beck (guarantor),[1] to pay amounts due to the plaintiff under a commercial lease for property located at 482 Glenbrook Road in Stamford (property). The plaintiff claims that the court (1) erred when it failed to include in its judgment for the plaintiff an amount for unpaid real estate taxes and (2) abused its discretion in awarding only $6391.63 in attorney's fees. We reverse in part the judgment and remand the matter to the trial court.

The record reflects the following undisputed facts and procedural history. On December 12, 2003, the plaintiff, as the landlord, and the defendants, as the tenant and guarantor respectively, entered into a written commercial lease (lease) for the property. The lease was modified by agreement on January 20, 2012, and the rent was set to $8500 per month beginning February 1, 2012. The lease also required the defendants to pay all real estate taxes and to keep the property properly insured.

During the term of the lease, as modified, the lessee defaulted on its obligations under the lease. Thereafter, on September 9, 2013, the plaintiff brought a complaint[2] against the lessee and the guarantor alleging, among other things, that the lessee had breached the lease by failing to make payments as required by the lease. The

[1] Gilbert Beck, who is the president of Sport-N-Life Distributing, LLC, executed a personal guarantee in which he obligated himself to complete "prompt payment of all rent, and the performance of all the terms, covenants, and conditions provided in [the] [l]ease."

[2] The complaint contained two counts, one against the lessee for its failure to make payments as required by the lease and the second count against the guarantor for his failure to meet his obligations as the guarantor of the payments. Because, as a practical matter, their obligations were merged, we refer to them as the defendants without distinction.

plaintiff sought payment of those amounts and reasonable attorney's fees as provided for in the lease. The plaintiff also sought a prejudgment remedy in the amount of $75,000. Its application for a prejudgment remedy was supported by the affidavit of Bruce Sclafani, the plaintiff's managing member. Sclafani averred that the defendants owed $17,000 for the unpaid July and August rent, $33,934.33 in unpaid real estate taxes, and $2266 in unpaid insurance premiums. Subsequently, the court granted a stipulated prejudgment remedy in the amount of $75,000. Once the pleadings were closed, the matter was referred by the trial court to an attorney trial referee for a hearing and report pursuant to the provisions of Practice Book § 19-2a. Thereafter, the attorney trial referee conducted an evidentiary hearing during which testimony was taken and documents were admitted into evidence. On February 26, 2016, the attorney trial referee filed her report pursuant to Practice Book § 19-8.

In her report, the attorney trial referee noted that the plaintiff had offered testimony that the defendants had failed to pay rent from August, 2013, through February, 2014, that the defendants had failed to pay the real estate taxes due in July, 2012, and January and July, 2013, in the amount of $33,934.33, and had failed to pay hazard insurance premiums in the amount of $2266. She noted, as well, that the plaintiff had testified that the defendants had caused damage to the property in the amount of $30,785.74. The defendants disputed that they had caused any damage to the property, but did not dispute the plaintiff's evidence of the unpaid taxes. Having acknowledged the plaintiff's testimony that the defendants failed to pay the real estate taxes amounting to $33,934.33 and hazard insurance premiums in the stated amount, the attorney trial referee nevertheless concluded in her report that the plaintiff had failed to provide any evidence regarding either the real estate taxes or insurance premiums.

The attorney trial referee recommended judgment enter for the plaintiff in the form of $51,000 for rent, less the security deposit of $15,000; $5535.74 for damages to the property; interest in the amount of $543.90; and taxable costs of the action; and she recommended that the court issue an award of attorney's fees in favor of the plaintiff.

Following the issuance of the report, the plaintiff filed an objection to the report and the entry of judgment in accordance with the attorney trial referee's recommendations. Specifically, the plaintiff alleged that the attorney trial referee erroneously had concluded that the plaintiff had failed to adduce evidence of the defendants' failure to pay real estate taxes or hazard insurance premiums as the transcript of the hearing, as well as documentary evidence submitted during the hearing, provided evidence contrary to the report. On July 28, 2016, the court denied the objection. The court rendered "[j]udgment for the plaintiff in the amount of $41,535.74 in damages[3] and $543.90 in interests and costs in the amount of $531.25, for a total of $42,610.89." Notably, the judgment included no provisions for real estate taxes or insurance payments.

On August 9, 2016, the plaintiff filed a motion for attorney's fees pursuant to Practice Book § 11-21 in the amount of $26,604.12.[4] With its motion, the plaintiff attached an affidavit and supporting invoices detailing the hours expended and the hourly rates charged for legal services. At the hearing on the plaintiff's motion, the plaintiff argued that the fees associated with this case were reasonable under the circumstances. In response, the defendants declined the opportunity to examine counsel as to the reasonableness of his hourly

[3] The court's award of damages corresponds to the attorney trial referee's recommendation ($51,000 minus $15,000 plus $5535.74 equals $41,535.74).

[4] During the hearing, the plaintiff provided the court with updated time sheets that reflected a new total of $27,904.12 in legal fees due to counsel for the plaintiff.

rate or the hours expended. In asking the court to order a reasonable amount of attorney's fees, the defendants' counsel claimed, without any supporting evidence, that the plaintiff had been overly litigious. The defendants' counsel asked the court to issue an order for fees commensurate with the underlying relief sought by the plaintiff and he sought the sympathy of the court.

On November 14, 2016, the court, *Rodriguez, J.*, granted the plaintiff's motion for attorney's fees in the amount of $6391.63. The plaintiff moved for articulation with regard to the court's decision with regard to attorney's fees on November 21, 2016, which the court denied. This appeal followed and, thereafter, the plaintiff moved for articulation with regard to both the court's July 28, 2016 judgment and its November 14, 2016 decision as to attorney's fees. The court again denied the plaintiff's motion for articulation but this court ordered the court to provide such an articulation.[5] Additional facts will be set forth as necessary. At issue are whether the court abused its discretion in failing to make an award for unpaid real estate taxes and whether the court's award of attorney's fees was reasonable. We review each claim in turn.

I

The plaintiff claims that the trial court erred in rendering judgment for the plaintiff without awarding any damages related to the defendants' failure to pay the real estate taxes as required by the lease. More specifically, the plaintiff argues that the defendants made judicial admissions as to their liability for the taxes and,

[5] Following the trial court's denial of the plaintiff's motion for articulation, the plaintiff filed an appeal with this court together with a motion to review the trial court's denial, pursuant to Practice Book § 66-6. This court granted the motion for review and ordered the trial court to "articulate (1) why it rendered judgment in favor of the defendants on the issue of real estate taxes and (2) why it only awarded the plaintiff $6391.63 in attorney's fees when the plaintiff sought $27,904.12 in such fees." Judge Rodriguez issued his articulation on November 30, 2018. The contents of that articulation will be addressed throughout this opinion.

moreover, that the attorney trial referee's finding that there was no evidence of the defendants' failure to pay the taxes was clearly erroneous in light of the undisputed evidence of the defendants' liability and their failure to pay. We agree with the plaintiff's second argument.[6]

We begin with the relevant legal principles that guide our analysis of this claim. "It is axiomatic that [a] reviewing authority may not substitute its findings for those of the trier of the facts. This principle applies no matter whether the reviewing authority is the Supreme Court . . . the Appellate Court . . . or the Superior Court reviewing the findings of . . . attorney trial referees. . . . This court has articulated that attorney trial referees and [fact finders] share the same function . . . whose determination of the facts is reviewable in accordance with well established procedures prior to the rendition of judgment by the court. . . .

"The factual findings of a [trial referee] on any issue are reversible only if they are clearly erroneous. . . . [A reviewing court] cannot retry the facts or pass upon the credibility of the witnesses. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Gould* v. *Hall*, 64 Conn. App. 45, 49–50, 779 A.2d 208 (2001).

Furthermore, "it is the function of this court to determine whether the decision of the trial court is clearly erroneous. . . . This involves a two part function: where the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts

[6] Because we reverse in part the judgment of the trial court and remand the case on the basis of the plaintiff's second argument, we need not address the first argument.

set out in the memorandum of decision; where the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous. . . .

"[Additionally], we note that, because the attorney [fact finder] does not have the powers of a court and is simply a fact finder, [a]ny legal conclusions reached by an attorney [fact finder] have no conclusive effect. . . . The reviewing court is the effective arbiter of the law and the legal opinions of [an attorney fact finder], like those of the parties, though they may be helpful, carry no weight not justified by their soundness as viewed by the court that renders judgment." (Citation omitted; internal quotation marks omitted.) *Walpole Woodworkers, Inc.* v. *Manning*, 126 Conn. App. 94, 99, 11 A.3d 165 (2011), aff'd, 307 Conn. 582, 57 A.3d 730 (2012).

The following additional facts are relevant to our resolution of this claim. During the hearing before the attorney trial referee, the plaintiff elicited evidence from its managing member, Bruce Sclafani. He testified that the defendants did not meet their respective obligations under the lease and guarantee; specifically, that the defendants did not pay the real estate taxes, rent, and insurance. During direct examination, Sclafani confirmed the amounts due as set forth in the plaintiff's exhibit 4—plaintiff's statement of amount due—which provided an itemized list of the amounts outstanding, including the real estate taxes in the amount of $33,934.33. At one point during his direct examination, when Sclafani was asked by his counsel to read aloud from the exhibit the specific amounts listed, the defendants' counsel objected. He stated: "The document speaks for itself. I think it's in evidence. It's a—if we're talking about the plaintiff's statement of amount due."

The court sustained this objection. Additionally, during cross-examination, counsel for the defendants presented Sclafani with defendants' exhibit A, which was the affidavit signed by Sclafani in conjunction with the plaintiff's application for a prejudgment remedy. This document purported to itemize amounts due, at that time, for rent, taxes, and insurance. During this cross-examination, the defendants' counsel elicited testimony from Sclafani that the exhibit entered on behalf of the defendants stated that the defendants owed real estate taxes in the amount of $33,934.33.[7] In response to that questioning, Sclafani confirmed that the information contained in defendants' exhibit A was correct. In short, at the defendants' prodding and in response to a document placed into evidence by the defendants, the plaintiff confirmed that the defendants owed $33,934.33 in taxes.

Later, in closing arguments before the attorney trial referee, counsel for the defendants twice referred to defendants' exhibit A, Sclafani's affidavit of amounts due to the plaintiff at the time the prejudgment remedy application was filed, and asked the court to note that exhibit and to enter orders consistent with its contents. At one point, counsel sought to direct the court's attention to Sclafani's affidavit and later, in the same argument, counsel for the defendants asked the court to use Sclafani's affidavit to calculate damages and then to add to it amounts for rent due for the months the lessee occupied the premises after the date of Sclafani's affidavit. The only portion of the plaintiff's damages claim that the defendants disputed was that related to alleged physical damage caused to the property by the defendants, as to which, the defendants argued that

[7] It appears that the defendants offered this exhibit because it reflected a lower amount due for rent, a discrepancy that was resolved at trial once it became evident that the lessee had remained on the premises for additional months without paying rent.

there was insufficient evidence. Consequently, counsel argued that if he were correct about the plaintiff's failure to prove that the defendants caused physical damage to the property, "[t]hen my client owes the $53,000 stated in the affidavit, minus the $15,000 security [deposit]." There is no dispute that the $33,934.33 owed for the real estate taxes was included in Sclafani's affidavit to which counsel referred. In short, our review of the record of the hearing before the attorney trial referee reflects that the amount of taxes due to the plaintiff from the defendants was not only introduced into evidence but was undisputed by the defendants.[8]

Notwithstanding the testimony of Sclafani, the itemized exhibits admitted during the hearing, and the defendants' acknowledgement of this debt, the attorney trial referee concluded that the plaintiff failed to provide any evidence of the real estate taxes owed. When the trial court reviewed the attorney trial referee's report and the exhibits presented at trial, it accepted the findings in the report and rendered judgment in accordance with the recommendation of that report.

On the basis of our careful review of the record, we conclude that the decision of the trial court to accept the attorney trial referee's factual findings, with respect to the real estate taxes, was improper. Contrary to the attorney trial referee's factual findings, the record clearly reflects testimony and documentary evidence in support of the plaintiff's tax claim. Both the plaintiff and the defendants provided evidence, either through testimony or full exhibits, that the defendants were obligated to pay the taxes for the property, that the defendants failed to meet that obligation, and, as a result, the defendants then owed the plaintiff $33,934.33 in real estate taxes. Given that the defendants did not

[8] During oral argument before this court, counsel for the defendants acknowledged that the defendants owed real estate taxes in the amount claimed by the plaintiff.

dispute the amount of the real estate taxes due to the plaintiff, and there was ample evidence to support the plaintiff's claim regarding taxes, the court should have added the undisputed amount of $33,934.33 to the damages it awarded the plaintiff.

II

Next, the plaintiff claims that the trial court abused its discretion in awarding only $6391.63 in attorney's fees. More specifically, the plaintiff contends that the court considered only one factor in determining the award of attorney's fees, it did not determine a reasonable hourly rate or a reasonable number of hours expended upon litigation, and it improperly awarded attorney's fees based on the amount of damages awarded to the plaintiff.

"[T]he amount of attorney's fees to be awarded rests in the sound discretion of the trial court and will not be disturbed on appeal unless the trial court has abused its discretion: A court has few duties of a more delicate nature than that of fixing counsel fees. The degree of delicacy increases when the matter becomes one of review on appeal. The principle of law, which is easy to state but difficult at times to apply, is that only in cases of a clear abuse of discretion by the trier may we interfere. . . . The trier is always in a more advantageous position to evaluate the services of counsel than are we." (Internal quotation marks omitted.) *Schoonmaker* v. *Lawrence Brunoli, Inc.*, 265 Conn. 210, 258–59, 828 A.2d 64 (2003).

The trial court's exercise of discretion, however, is not unbounded as there are parameters for the court's reasonable exercise of its judgment. "[T]he initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate. . . . The courts may then adjust this lodestar calculation by other factors [outlined in *Johnson* v.

Georgia Highway Express, Inc., 488 F.2d 714, 717–19 (5th Cir. 1974)]. . . . The *Johnson* factors may be relevant in adjusting the lodestar amount, but no one factor is a substitute for multiplying reasonable billing rates by a reasonable estimation of the number of hours expended on the litigation." (Footnote omitted; internal quotation marks omitted.) *Carrillow* v. *Goldberg*, 141 Conn. App. 299, 317–18, 61 A.3d 1164 (2013).

"It is well established that a trial court calculating a reasonable attorney's fee makes its determination while considering the factors set forth under rule 1.5 (a) of the Rules of Professional Conduct.[9] . . . A court utilizing the factors of rule 1.5 (a) considers, [among other things], the time and labor spent by the attorneys, the novelty and complexity of the legal issues, fees customarily charged in the same locality for similar services, the lawyer's experience and ability, relevant time limitations, the magnitude of the case and the results obtained, the nature and length of the lawyer-client relationship, and whether the fee is fixed or contingent." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Schoonmaker* v. *Lawrence Brunoli, Inc.*, supra, 265 Conn. 259; see also *Altschuler* v. *Mingrone*, 98 Conn. App. 777, 781, 911 A.2d 337 (2006), cert. denied, 281 Conn. 927, 918 A.2d 276 (2007); Rules of Professional Conduct 1.5. "[This] list of factors is not, however, exclusive. The court may assess the reasonableness of the fees requested using any number of factors . . . ." (Internal quotation marks omitted.) *Glastonbury* v. *Sakon*, 184 Conn. App. 385, 394, 194 A.3d 1277 (2018).

After the court rendered judgment for the plaintiff, it conducted a hearing regarding attorney's fees on October 13, 2016. During that hearing, the plaintiff's

[9] The criteria set forth in rule 1.5 (a) of the Rules of Professional Conduct parallel, in large part, those factors set forth in *Johnson* v. *Georgia Highway Express, Inc.*, supra, 488 F.2d 717–19, with the exception of two that are found in *Johnson* but not in rule 1.5 (a) of the Rules of Professional Conduct.

counsel submitted time sheets and affidavits in support of his argument that he was owed $27,904.12 in attorney's fees. Defense counsel declined the opportunity to examine the plaintiff's counsel and he made no argument that counsel's hourly rates were unreasonable. Rather, he argued, without any supporting evidence, that the plaintiff had been overly litigious and, as noted, he sought the court's sympathy on behalf of the defendant guarantor. Specifically, he claimed to the court that the plaintiff had sold the property at a windfall profit and that his client, the guarantor, on the other hand, had lost his business, was elderly, on a fixed income, and would have to pay the judgment by securing a reverse mortgage while trying to hold on to his home.[10]

Subsequent to the October 13, 2016 hearing, the court rendered judgment granting the plaintiff's motion for attorney's fees in the amount of $6391.63. Following an order from this court, Judge Rodriguez articulated that he awarded that amount because $27,904.12 was "excessive and unreasonable under the circumstances" and "[a]n attorney's fee award of $6391.63 is reasonable *based on the judgment of $41,535.74*." (Emphasis added.)

This court has "consider[ed] problematic [a] court's use of the amount in controversy as a gauge for the award of attorney's fees. This court previously has held that the consideration of the amount involved, isolated from all other factors, is an improper gauge for a reasonable award of attorney's fees." *Costanzo* v. *Mulshine*, 94 Conn. App. 655, 664, 893 A.2d 905, cert. denied, 279

Those two factors include the undesirability of the case and awards in similar cases.

[10] It is axiomatic that appeals to the sympathy of the court are not appropriate argument concerning an award of attorney's fees, and that the court is required to decide the plaintiff's entitlement to attorney's fees by dispassionately assessing the relevant facts in light of the legal criteria for such an award.

Conn. 911, 902 A.2d 1070 (2006). Because the court indicated in its articulation that it tied its award of attorney's fees to the amount of the damages awarded to the plaintiff, we conclude that the amount awarded for attorney's fees must be vacated and a new hearing held.

The judgment is reversed with respect to the trial court's failure to award real estate taxes and with respect to its award of attorney's fees and the case is remanded with direction to award the plaintiff $33,934.33 for past due real estate taxes and to conduct a hearing and issue a reasonable order for the payment of attorney's fees consistent with the requirements of law; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ANTHONY MAGARACI (AC 42264)

DiPentima, C. J., and Keller and Flynn, Js.

Syllabus

Convicted, after a jury trial, of the crime of assault in the first degree in connection with an altercation between the defendant and W during which the defendant stabbed W and B with a knife, the defendant appealed to this court. He claimed, inter alia, that there was insufficient evidence to support his conviction because the state failed to disprove beyond a reasonable doubt that he acted in self-defense. *Held*:

1. The state produced sufficient evidence to disprove the defendant's theory of self-defense beyond a reasonable doubt, as there was evidence, which the jury reasonably could have credited, that the defendant was the initial aggressor who had lunged at and stabbed W and, in the process, had stabbed B, and the jury was free to disbelieve the defendant's version of events; moreover, the jury reasonably could have determined that the state carried its burden of proving beyond a reasonable doubt that the defendant used deadly force against W despite the fact that he had actual knowledge of his ability to retreat safely, as he admitted on cross-examination that he could have walked away from W.
2. This court declined to review the merits of the defendant's claim that he was deprived of his constitutional right to a unanimous verdict when the trial court improperly charged the jury on self-defense by failing to

expressly instruct the jury that it must unanimously agree on the factual basis for rejecting his theory of self-defense, the defendant having waived his claim of instructional error; the record indicated that the court provided defense counsel with a copy of its charge, which included the self-defense and unanimity instructions that were read to the jury, and with a meaningful opportunity to review the instructions, that the court solicited comments from counsel before and after it read the instructions to the jury, that defense counsel not only failed to object to the charge but indicated his satisfaction with it, and that counsel did not file a request to charge to alert the court to any potential issues with the charge.

Argued February 3—officially released June 23, 2020

Procedural History

Substitute information charging the defendant with two counts of the crime of assault in the first degree, brought to the Superior Court in the judicial district of Middlesex and tried to the jury before *Suarez, J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Norman A. Pattis, for the appellant (defendant).

Matthew A. Weiner, assistant state's attorney, with whom, on the brief, were *Michael A. Gailor*, state's attorney, and *Eugene R. Calistro, Jr.*, former supervisory assistant state's attorney, for the appellee (state).

Opinion

FLYNN, J. The defendant, Anthony Magaraci, appeals from the judgment of conviction, rendered following a jury trial, of two counts of assault in the first degree in violation of General Statutes § 53a-59 (a) (1). The defendant claims that (1) the state adduced insufficient evidence to support his conviction because it had failed to disprove beyond a reasonable doubt that he acted in self-defense, and (2) the court improperly instructed the jury on self-defense. We conclude that the evidence sufficed to permit the jury, as the arbiters of the credibility of witnesses, reasonably to conclude that the defendant was the original aggressor and that he had stabbed the victims even though he could have safely retreated.

We also conclude that the defendant waived any claim of instructional error. We, therefore, affirm the judgment of the trial court.

The jury reasonably could have found the following facts. Cheryl Bell invited her longtime friend, Tina Peraino, who was living in Florida, to visit and stay with her and her husband, Ryan Bell, over Memorial Day weekend, 2017. The defendant, who lived in West Haven and who was dating Peraino, accompanied Peraino. After meeting Peraino at the airport, the defendant and Peraino arrived at the Bells' residence in the early morning of Friday, May 26, 2017. On Friday night, following dinner, the defendant, Peraino, and Ryan Bell went to the house of the Bells' neighbor, Chris Abbatello, to socialize and to drink beer. Ryan Bell introduced Peraino to another guest, Justin Wyatt, and the two began conversing while the defendant was standing by Peraino. During the conversation, Wyatt made a derogatory comment about Peraino's job as a paralegal that made Peraino uncomfortable. After returning to the Bells' residence, the defendant stated that Wyatt "needs a crack in the mouth." According to Ryan Bell, the next day the defendant appeared "bitter" and "agitated" about that conversation that had occurred the night before. The defendant referred to Wyatt using an insulting scatological term.

On Sunday, Abbatello hosted a picnic at a state park. Between forty and sixty people were in attendance, including the defendant, Peraino, and Wyatt.[1] Around 5:30 p.m., the defendant, Peraino, and Ryan Bell left the picnic and went to the house of another neighbor

[1] Wyatt testified that he had no contact with the defendant or Peraino at the picnic other than briefly introducing them to a friend. Peraino testified that Wyatt told her that she would have more fun if she were with him instead of the defendant. Peraino testified that both she and the defendant thought that comment was disrespectful. Other guests testified that they did not see any interaction between Wyatt and either Peraino or the defendant.

of the Bells, Paula Bourdon and Tim Bourdon. An after party ensued at the Bourdons' house, which included socializing, drinking alcoholic beverages, and playing horseshoes. The defendant, Peraino, Ryan Bell, and Wyatt were drinking beer. Cheryl Bell was the only one of the group who was not drinking alcohol.

The defendant, who was "quite upset," said to Paula Bourdon that he "could handle himself" and displayed a knife that had been in his pocket. He also stated to Paula Bourdon that "he knew Hells Angels and . . . was not the kind of person to be messed with." Around 8 p.m., Wyatt, who was holding a beer bottle in his right hand, turned around and, upon seeing the defendant, switched the beer bottle to his left hand and extended his right hand. The defendant did not shake Wyatt's hand, yelled that Wyatt had disrespected him, and shouted several times for Wyatt to go for a walk with him. Wyatt yelled back "absolutely not." Cheryl Bell, who had been standing nearby, shouted to Ryan Bell, who was playing horseshoes, to "come over." Ryan Bell then positioned himself in between the defendant and Wyatt. The defendant became "very upset," lunged at Wyatt, and the two began "to swing at each other." Ryan Bell "grabbed" Wyatt, "pulled him back," and felt "a graze." Another guest, John Surprenant, stopped playing horseshoes and went over to see if he could help stop the altercation. After the altercation, the defendant stated, "that will teach you," and placed the folding knife in his pocket.

After a few moments, Wyatt felt a "hot coffee" like sensation, and upon lifting his sweatshirt, noticed "blood gushing" from his abdomen. He began to have trouble breathing. Ryan Bell also sustained a stab wound. Tyler Peska, who was also at the Bourdons' gathering, called 911. Both Wyatt and Ryan Bell were transported to a hospital for treatment. Wyatt had a four centimeter by two centimeter stab wound to his abdomen that caused an apical pneumothorax, or air outside the apex of his lung. He was admitted to the hospital for monitoring and released the following day. Ryan Bell had an eight centimeter stab wound on his left abdomen that did not penetrate "the strength layers of the abdomen" and was discharged after receiving stitches.

Corporal Bryan Pellegrini, a member of the Clinton Police Department and the lead investigator on the case, responded to the scene, and he and other Clinton officers took statements from witnesses after the stabbings. He did not take statements from some individuals because they were too intoxicated. The police recovered the broken neck of a beer bottle approximately fifty feet from where the incident had taken place. Forensic testing revealed that the DNA on the mouth of the beer bottle matched Wyatt's DNA profile. Pellegrini went to the hospital, noticed that Wyatt was "still making sense," and took Wyatt's statement while he was awaiting treatment. According to blood tests taken at the hospital, Wyatt's blood alcohol content was 0.167 percent and Ryan Bell's blood alcohol content was 0.07 percent.[2]

After the altercation, the defendant and Peraino walked quickly toward the Bells' house and packed their belongings. On their way to a restaurant near Bradley International Airport, the defendant threw the knife out the car window. As he was leaving the restaurant, the defendant was arrested. Police officers did not notice any visible injuries to the defendant's head or face, but noticed a cut on the defendant's finger that he could not explain.

At trial, the defendant conceded that he had stabbed Wyatt and Ryan Bell, but contended that he did so in self-defense. The defendant testified to the following

[2] General Statutes § 14-227a (a) (2) provides in part that a person commits the offense of operating a motor vehicle while under the influence of intoxicating liquor if that person operates a motor vehicle while having a blood alcohol content of 0.08 percent or more.

version of events regarding the altercation at the Bourdons' house. While he was conversing with Peraino and Cheryl Bell, Wyatt approached him carrying an empty beer bottle in his right hand. Wyatt switched the bottle to his left hand and asked if he wanted to shake hands. The defendant responded that if Wyatt apologized for his "rude and disrespectful behavior" then he would "be glad" to shake Wyatt's hand. Wyatt responded with an obscenity and began "posturing" in a way that made the defendant think that Wyatt was trying to "intimidate" and "terrorize" him with the beer bottle. He did not walk away because he thought that Wyatt would hit him on the head with the beer bottle if he turned his back. He told Wyatt, "please don't come at me with that beer bottle, if you do, you're gonna force me to defend myself with what I have in my pocket." Cheryl Bell yelled at Wyatt to "leave him alone," and called out to Ryan Bell. Then, "all of a sudden," Cheryl Bell was out of the way. The defendant "waited [until Wyatt] raised the bottle before [he] pulled the knife out of [his] pocket. And then, when [Wyatt] lunged forward with . . . the beer bottle, [he] went forward with the knife." The beer bottle "glanced off" the side of his head and Ryan Bell intercepted the path of the knife, apparently getting cut in the process. Wyatt grabbed him around the throat and the defendant "thrust again," stabbing Wyatt. On cross-examination, the defendant stated that he "could have walked away," but he did not.

Following a jury trial, the defendant was convicted of two counts of assault in the first degree. The court imposed a total effective sentence of twenty years of incarceration, suspended after nine years, with five years of probation. This appeal followed.

I

The defendant first claims that the state adduced insufficient evidence to prove beyond a reasonable doubt that he did not act in self-defense. We disagree.

The defendant preserved this claim by moving, at the close of the state's case, for a judgment of acquittal on the basis of insufficient evidence. Regardless of preservation, we review insufficiency claims because "any defendant who is found guilty on the basis of insufficient evidence has been deprived of a constitutional right and is entitled to review whether or not the claim was preserved at trial." *State* v. *Pommer*, 110 Conn. App. 608, 612, 955 A.2d 637, cert. denied, 289 Conn. 951, 961 A.2d 418 (2008), citing *Jackson* v. *Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). "In reviewing a sufficiency of the evidence claim, we apply a [two part] test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the jury reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Internal quotation marks omitted.) *State* v. *Merriam*, 264 Conn. 617, 628–29, 835 A.2d 895 (2003).

The jury was given evidence of two conflicting versions of events. In one, the defendant first lunged at Wyatt with a knife. In the other, the defendant was hit over the head with a beer bottle and defended himself with a knife from further injury. During closing argument, defense counsel conceded that the elements of assault in the first degree were satisfied as to Wyatt and Ryan Bell.[3] The theory of the defense was that the

[3] General Statutes § 53a-59 (a) provides in relevant part: "A person is guilty of assault in the first degree when . . . (1) With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument . . . ."

defendant stabbed Wyatt and Ryan Bell in self-defense. In support of his defense, the defendant relied on his own testimony and Peraino's testimony that Wyatt began the altercation by striking the defendant on the head with a beer bottle after he declined to shake Wyatt's hand. He also relied on the physical evidence of a broken neck portion of a beer bottle containing Wyatt's DNA that the police recovered approximately fifty feet from the scene of the altercation.

Self-defense is a defense, but not an affirmative defense, which means that the defendant only has a burden of production and does not have a burden of persuasion; once the defendant introduces sufficient evidence to warrant presenting his claim of self-defense to the jury, it is the state's burden to disprove the defense beyond a reasonable doubt. *State* v. *Singleton*, 292 Conn. 734, 747, 974 A.2d 679 (2009). Whether the state has disproved self-defense is a question of fact for the jury. *State* v. *Pauling*, 102 Conn. App. 556, 571–72, 925 A.2d 1200, cert. denied, 284 Conn. 924, 933 A.2d 727 (2007).

Section 53a-19 (a) provides in relevant part that "a person is justified in using reasonable physical force upon another person to defend himself . . . from what he reasonably believes to be the use or imminent use of physical force, and he may use such degree of force which he reasonably believes to be necessary for such purpose; except that deadly physical force may not be used unless the actor reasonably believes that such other person is (1) using or about to use deadly physical force, or (2) inflicting or about to inflict great bodily harm." Section 53a-19 (b) specifies the circumstances under which a person has a duty to retreat and provides in relevant part that "a person is not justified in using deadly physical force upon another person if he or she knows that he or she can avoid the necessity of using such force with complete safety (1) by retreating

. . . .'' Section 53a-19 (c) provides: ''Notwithstanding the provisions of subsection (a) of this section, a person is not justified in using physical force when (1) with intent to cause physical injury or death to another person, he provokes the use of physical force by such other person, or (2) he is the initial aggressor, except that his use of physical force upon another person under such circumstances is justifiable if he withdraws from the encounter and effectively communicates to such other person his intent to do so, but such other person notwithstanding continues or threatens the use of physical force, or (3) the physical force involved was the product of a combat by agreement not specifically authorized by law.''

A jury's evaluation of a self-defense claim has both subjective and objective elements. See *State* v. *Hall*, 213 Conn. 579, 586 n.7, 569 A.2d 534 (1990). Section 53a-19 (b) requires both that a complete safe retreat be available and that the defendant know of it. See *State* v. *Quintana*, 209 Conn. 34, 46, 547 A.2d 534 (1988). To obtain a conviction, the state must sustain its burden of disproving beyond a reasonable doubt any of the essential elements of self-defense or sustain its burden of proving beyond a reasonable doubt that the statutory exceptions to self-defense codified in § 53a-19 (b) or (c) apply. See *State* v. *Grasso*, 189 Conn. App. 186, 200, 207 A.3d 33, cert. denied, 331 Conn. 928, 207 A.3d 519 (2019).

The defendant contends that the state failed to disprove that he acted in self-defense and that ''the verdict in this case is the product of speculation.'' He argues that no reasonable juror would have credited the testimony of the five state's witnesses whose testimony contradicted the defendant's version of the events of the altercation: Wyatt, Ryan Bell, Cheryl Bell, Peska, and Surprenant, because they had ''serious credibility issues, or simply lacked any real knowledge of the confrontation." The defendant argues that a reasonable juror would have questioned the veracity of these witnesses for the following reasons. Wyatt was intoxicated when he gave his statement to the police, which was inconsistent with his trial testimony. Peska testified that he did not remember who started the fight and the police officers declined to take his statement because they thought he was too intoxicated. The defendant contends that Cheryl Bell was biased against the defendant for ending her friendship with Peraino, which colored her testimony, and that she did not see the altercation because her husband, Ryan Bell pulled her out of the way before the altercation began. The defendant notes that Cheryl Bell was the only one who testified that she heard him say, after stabbing Wyatt, "that will teach you." The defendant states that Cheryl Bell did not include the disputed comment in her statement to the police. He further contends that Surprenant's testimony was not credible because he did not see the fight start and the police did not take an official statement because officers thought he was too intoxicated. The defendant further argues that a reasonable juror would have determined that the following testimony of two of the state's witnesses corroborated his version of events: Surprenant's testimony that he heard the defendant say that Wyatt had tried to hit him with a beer bottle, and Ryan Bell's testimony that he did not recall seeing anything in Wyatt's hand at the time of the fight but heard a bottle break on the ground as Cheryl Bell called him over. The defendant also notes that Ryan Bell was on Pellegrini's list of witnesses whose official statements were not taken by investigative police officers because those witnesses were deemed intoxicated. He further argues that the state failed to explain the broken beer bottle that contained Wyatt's DNA.

The defendant essentially argues that the state failed to disprove self-defense because its eyewitnesses lacked credibility. However, it is not the role of this court to question the jury's credibility determinations. "[I]t is well established that we may not substitute our judgment for that of the [trier of fact] when it comes to evaluating the credibility of a witness. . . . It is the exclusive province of the trier of fact to weigh conflicting testimony and make determinations of credibility, crediting some, all or none of any given witness' testimony. . . . Questions of whether to believe or disbelieve a competent witness are beyond our review. As a reviewing court, we may not retry the case or pass on the credibility of witnesses."[4] (Internal quotation marks omitted.) *State* v. *DeMarco*, 311 Conn. 510, 519–20, 88 A.3d 491 (2014). Therefore, it was within the province of the jury to assess the credibility of the state's eyewitnesses, and the jury was not obligated to discredit the testimony of the witnesses whose credibility was called into question. See *State* v. *Owens*, 63 Conn. App. 245, 250, 775 A.2d 325, cert, denied, 256 Conn. 933, 776 A.2d 1151 (2001).

With these principles in mind, we conclude that the state produced sufficient evidence to disprove the defendant's theory of self-defense beyond a reasonable doubt. There was evidence, which the jury reasonably could have credited, that the defendant was the initial aggressor who lunged at and stabbed Wyatt and, in the process, stabbed Ryan Bell. Wyatt testified that he did not threaten the defendant with a beer bottle and that the defendant was the one who "came at" him. Cheryl Bell testified that the defendant threw the first punch. Ryan Bell testified that, after Cheryl Bell called him

[4] Witness competency is within the discretion of the trial court. See *State* v. *Webb*, 75 Conn. App. 447, 462–63, 817 A.2d 122, cert. denied, 263 Conn. 919, 822 A.2d 244 (2003). The testimony at issue was admitted into evidence, and there is no dispute regarding the competency of these witnesses.

over, he saw a scuffle and pulled Wyatt back as the defendant was lunging at Wyatt. The defendant testified that, after the altercation, he discarded the knife. Additionally, the fact that the police did not take official statements from certain witnesses because the police officers thought they were too intoxicated, does not obligate the jury to abandon its role as the sole arbiter of the credibility of these witnesses and automatically discount their testimony. Rather, it is the unique role of the jury to weigh conflicting evidence, to determine the credibility of witnesses, and to decide whether to accept or reject, in whole or in part, the testimony of a witness. See, e.g., *State* v. *Terry*, 161 Conn. App. 797, 800 n.2, 128 A.3d 958 (2015), cert. denied, 320 Conn. 916, 131 A.3d 751 (2016). Although some witnesses reported hearing a bottle crash as the altercation began, the broken beer bottle containing Wyatt's DNA was found fifty feet from the scene of the altercation. To the extent that such evidence can be seen as supporting the defendant's theory, evidence is not insufficient because it is inconsistent or conflicting. See *State* v. *Vega*, 128 Conn. App. 20, 27, 17 A.3d 1060, cert. denied, 301 Conn. 919, 21 A.3d 463 (2011). The existence of evidence which, under one interpretation, could be viewed as supporting the defendant's version of events does not obligate the jury to interpret it in that light. See, e.g., *State* v. *Terry*, supra, 800 n.2. The jury was free to disbelieve the defendant's version of events that Wyatt was about to inflict great bodily harm on him by hitting him on the head with a beer bottle and that he "went forward" with a knife after Wyatt lunged at him with a beer bottle. The jury also was free to disbelieve the portion of the defendant's testimony that he had asked Wyatt not to attack him with the beer bottle, otherwise he would have to defend himself with a knife. Additionally, even if the jury credited the defendant's version of events, the jury reasonably could have determined that the state carried its burden of proving beyond a reasonable doubt that the defendant used deadly force against Wyatt despite the fact that he had actual knowledge of his ability to retreat safely. The defendant admitted on cross-examination that he "could have walked away."

For the foregoing reasons, we conclude that the defendant cannot prevail on his insufficiency claim.

II

The defendant next claims that he was deprived of his right, under article first, §§ 8 and 19, of the Connecticut constitution, to a unanimous verdict when the court improperly charged the jury on self-defense by failing to expressly instruct the jury that it must unanimously agree on the factual basis for rejecting the defendant's theory of self-defense. The state responds that the defendant implicitly waived this claim. We agree with the state and, accordingly, do not reach the merits of this claim.

The state filed a request to charge on March 20, 2018. Defense counsel did not file a request to charge. On March 21, 2018, the court stated that it had incorporated comments from both counsel into its jury charge and had a draft ready for counsel to review overnight. The draft charge included the self-defense and unanimity instructions that were later read to the jury the following day.[5] On March 22, 2018, the court noted on the record that it had held an in-chambers charge conference that morning and had accepted all of the suggestions made by the state and the defendant. The court

[5] The court charged the jury on the elements and exceptions to self-defense and further charged: "You must remember that a defendant has no burden of proof whatsoever with respect to the defense of self-defense. Instead, it is the state that must prove beyond a reasonable doubt that the defendant did not act in self-defense if it is to prevail on its charge of crime of assault in the first degree. To meet this burden, the state need not disprove all four of the elements of self-defense. Instead, it can defeat the defense of self-defense by disproving any one of the four elements of self-defense beyond a reasonable doubt to your unanimous satisfaction."

stated it would detail the changes for the record if either counsel so requested. The state responded that it was satisfied and that it was not necessary to go through the changes. Defense counsel responded, "I'm very satisfied. Thank you. I think it's an excellent charge." The court inquired if both counsel had an opportunity to review the charge, and defense counsel answered affirmatively. After the court read its final charge to the jury, outside the presence of the jury, the court asked defense counsel if he had any objection. Defense counsel responded, "I have nothing. I thought it was good."

We exercise plenary review when determining whether a defendant waived the right to challenge a jury instruction. See *State* v. *Mungroo*, 299 Conn. 667, 672–73, 11 A.3d 132 (2011). "Connecticut courts have deemed a claim of instructional error implicitly waived when the defense failed to take exception to, and acquiesced in, the jury instructions following one or more opportunities to review them. . . . [W]hen the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal." (Citations omitted.) *State* v. *Kitchens*, 299 Conn. 447, 480–83, 10 A.3d 942 (2011).

The circumstances of the present case are similar to those in *State* v. *Davis*, 163 Conn. App. 458, 136 A.3d 257 (2016). In that case, this court determined that the doctrine of implied waiver precluded substantive review of the defendant's claim of instructional impropriety where the court provided counsel with a copy of the proposed instructions the day before the charge conference, the parties indicated during the conference that they had reviewed the proposed instructions, defense counsel indicated one change to the instructions and otherwise stated that the instructions were " 'fair to both parties,' " and defense counsel voiced no objection to the instruction at issue. Id., 478–79.

Following our careful review of the record, we conclude that the defendant implicitly waived this instructional claim. The record reflects that, at least one day before it instructed the jury, the court provided counsel with copies of its charge, which included the self-defense and unanimity instructions that were read to the jury. Under these circumstances, defense counsel had a meaningful opportunity to review the instructions. See id. The court solicited comments from counsel before and after it read the instructions to the jury. Defense counsel not only failed to object, but he also indicated that he was "very satisfied" with the court's "excellent charge." Defense counsel did not file any request to charge with the court alerting it to any claim regarding the jury instructions of the kind now raised on appeal. Because defense counsel implicitly waived this claim of instructional impropriety, we do not review the merits of this claim.[6]

The judgment is affirmed.

In this opinion the other judges concurred.

[6] The defendant contends that his claim is of constitutional magnitude because it implicates the constitutional right to a unanimous verdict and otherwise satisfies the requirements of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781,120 A.3d 1188 (2015). Because the defendant implicitly waived his instructional claim, he cannot obtain relief under *Golding*. See *State* v. *Ramon A. G.*, 190 Conn. App. 483, 503 n.13, 211 A.3d 82, cert. granted on other grounds, 333 Conn. 909, 215 A.3d 735 (2019). "A constitutional claim that has been waived does not satisfy [*Golding*'s] third prong . . . because, in such circumstances, we simply cannot conclude that injustice [has been] done to either party . . . or that the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial . . . ." (Internal quotation marks omitted.) *State* v. *Kitchens*, supra, 299 Conn. 467.

FRANCIS ANDERSON *v.* COMMISSIONER OF CORRECTION (AC 41434)

Lavine, Keller and Devlin, Js.

Syllabus

The petitioner, who had been convicted of assault in the second degree and reckless endangerment in the second degree, sought a writ of habeas corpus, claiming that the conditions of his confinement were illegal because he was receiving constitutionally inadequate mental health treatment. The petitioner was an insanity acquittee who had been confined to a state psychiatric hospital at the time of his crimes. During the petitioner's sentencing hearing, the trial court heard testimony from a psychologist that the petitioner should be transferred to a specialized behavioral unit in a prison in Maine that provided the treatment program she had recommended for the petitioner. The court did not order that the petitioner be returned to the hospital but remanded him instead to the custody of the respondent, the Commissioner of Correction. Subsequent to the filing of his habeas petition, the petitioner filed an emergency motion for an expedited hearing to compel the Department of Correction to follow the psychologist's treatment recommendations. After the respondent filed a motion to consolidate the emergency motion with the habeas trial, the court conducted a status conference on the motion to consolidate but did not grant the motion or specify if, at the next scheduled court date, there would be a hearing on the emergency motion or a consolidated habeas trial. During the proceeding before the habeas court, discussion between counsel and the court indicated that it was the court's intention to conduct the emergency hearing rather than a lengthy trial. After the hearing, the court issued an oral decision in which it rendered judgment denying the habeas petition. The petitioner then filed a motion for reconsideration, alleging that because the proceeding had been a hearing solely on his emergency motion, his rights to procedural due process were violated on the grounds that he had no notice that his habeas petition also would be decided and that he was denied a meaningful opportunity to be heard. The court granted the motion for reconsideration and affirmed its denial of the habeas petition. The court thereafter granted the petitioner certification to appeal, and the petitioner appealed to this court. *Held* that the ambiguities in the habeas proceeding should be interpreted in favor of the petitioner, as he reasonably believed that he was proceeding solely on his emergency motion and that his habeas trial would occur at a later date: the court, during the status conference, never formally granted the respondent's motion to consolidate, which resulted in the petitioner's uncertainty regarding the purpose of the subsequent proceeding, the colloquy during the status conference between the court and the respondent's counsel compounded the ambiguity, and the court scheduled the subsequent hearing for one-half day, which seemingly suggested that it was bifurcating the adjudication of the emergency motion and the habeas petition; moreover, the petitioner had sought a continuance solely for the hearing on his emergency motion, which the court granted without clarification that it would also schedule the habeas trial for that date, the habeas court thereafter repeatedly indicated that the matter before it was only the emergency motion, although the court appeared conflicted on the status of the case, as it suggested both that the emergency motion already had been resolved and that the proceeding before it was an expedited habeas trial, and the fact that the pleadings were not closed at the time of the proceeding before the habeas court supported the petitioner's belief that the proceeding scheduled for that date would not be a trial on his habeas petition; accordingly, the judgment was reversed and the case was remanded for further proceedings because, to hold otherwise, would deprive the petitioner of his procedural due process rights to be duly notified of the nature of the pending proceeding and to present fully his evidence and arguments to the court.

Argued February 13—officially released June 23, 2020

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the petitioner filed an emergency motion for a temporary order to compel the provision of certain mental health treatment recommendations; thereafter, the case was tried to the court, *Hon. Edward J. Mullarkey*, judge trial referee; judgment denying the petition; subsequently, the court granted the petitioner's motion for reconsideration and affirmed the judgment denying the petition, and the petitioner, on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

Jennifer B. Smith, assigned counsel, with whom, on the brief, was *Darcy McGraw*, assigned counsel, for the appellant (petitioner).

Steven R. Strom, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (respondent).

Opinion

DEVLIN, J. The petitioner, Francis Anderson, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus, which alleged that the conditions of his confinement were illegal because he was receiving constitutionally inadequate mental health treatment while he was in the custody of the respondent, the Commissioner of Correction. On appeal, the petitioner argues that the habeas court violated his right to procedural due process under the fourteenth amendment to the United States constitution by failing to provide him adequate notice of the habeas trial and denying him a meaningful opportunity to be heard. We reverse the judgment of the habeas court.[1]

The following facts and procedural history, as previously set forth by our Supreme Court and this court, are relevant. "The [petitioner] . . . has an extensive history of psychiatric problems and involvement with the criminal justice system. He has spent much of his adult life either incarcerated or in other institutionalized settings. Following an incident that occurred on or about July 6, 2012, the [petitioner] was charged with assault of a correction officer, breach of the peace and failure to submit to fingerprinting. The [petitioner] subsequently was found not guilty of these charges by reason of mental disease or defect. On August 15, 2013, the trial court, *McMahon, J.*, committed the [petitioner] to the custody of the Commissioner of Mental Health

[1] In the alternative, the petitioner contends that the habeas court erroneously concluded that the Department of Correction (department) was not acting with deliberate indifference to his serious mental health needs. We acknowledge that the habeas court heard extensive evidence on this issue and found that the respondent was not deliberately indifferent to his mental health needs. Because, however, we conclude that the petitioner was not afforded adequate notice and an opportunity to be heard on his habeas petition, we need not reach the issue of whether the department was deliberately indifferent.

and Addiction Services. The [petitioner] was transferred to the Whiting Forensic Division of Connecticut Valley Hospital [Whiting] . . . .

"Upon arriving at [Whiting], the [petitioner] allegedly commenced a pattern of assaulting other patients and hospital staff. As a result of his conduct on various dates from October, 2013, through February, 2014, he was charged with several misdemeanors. Thereafter, in April, 2014, he was charged with, inter alia, two counts of assault of health care personnel, a class C felony. See General Statutes § 53a-167c. In connection with all but one of these charges, the [petitioner] was released on a promise to appear and ordered returned to [Whiting]. Also, in April, 2014, the state filed a motion for bond review, in which it requested that the trial court modify the [petitioner's] existing conditions of release and impose an 'appropriate' monetary bond. . . .

"On June 18, 2014, the trial court, *Gold, J.*, concluded that, although the [petitioner] was a confined insanity acquittee, the court retained the authority, conferred by General Statutes § 54-64a and Practice Book § 38-4, to set a monetary bond upon his commission of new offenses in the hospital setting, particularly for the purpose of ensuring the safety of other persons. . . . On August 25, 2014 . . . the court set a bond in the amount of $100,000, cash or surety. Because the [petitioner] was unable to post that bond, he was transferred to the custody of the Commissioner of Correction." (Footnotes omitted.) *State* v. *Anderson*, 319 Conn. 288, 292–97, 127 A.3d 100 (2015) (*Anderson I*). "The [respondent] thereafter directed that the [petitioner] be confined at Northern Correctional Institution [Northern]." Id., 297 n.16. On appeal to our Supreme Court, the court affirmed the trial court's imposition of a monetary bond. Id., 290–92. The court further held that, "[i]f, however, at any time, the [petitioner] believes that the treatment he is receiving is inadequate, he may pursue an expedited petition for a writ of habeas corpus challenging the conditions of his confinement.'' Id., 325.

Subsequently, ''[a]s a result of the incidents that occurred while he was at Whiting, the [petitioner] was convicted, after a court trial, of one count of assault in the second degree in violation of General Statutes § 53a-60 (a) (3) and four counts of reckless endangerment in the second degree in violation of General Statutes § 53a-64 (a). At the [petitioner's] sentencing hearing, the prosecutor argued that sending the [petitioner] back to Whiting was not a viable option due to his repeated 'violent propensities toward staff, patients and inmates . . . .' Before articulating the [petitioner's] position at the sentencing hearing, defense counsel called Dr. Madelon V. Baranoski, a forensic psychologist who met with and evaluated the [petitioner], to testify. Baranoski testified, inter alia, that Whiting was not a suitable placement for the [petitioner]. In his remarks to the court, defense counsel explained the unique circumstances of the [petitioner]: 'He's a convicted criminal defendant awaiting sentencing . . . . He's [an] involuntarily committed insanity acquittee under the [jurisdiction of the Psychiatric Security Review Board].' Defense counsel argued that it was inappropriate to punish an insanity acquittee by incarceration, but acknowledged that 'the only practical options [for the petitioner] are available through the correction system . . . .' [Defense counsel] explained that 'he can't go back to Whiting untreated, and he shouldn't go back to Whiting, according to Dr. Baranoski, at all . . . .' '' *State* v. *Anderson*, 187 Conn. App. 569, 578–79, 203 A.3d 683 (*Anderson II*), cert. denied, 331 Conn. 922, 206 A.3d 764 (2019).

Instead, in a report commissioned by Dr. Baranoski on the petitioner's mental health, which was submitted to the sentencing court, she recommended that ''[the petitioner] is a candidate for a specialized behavioral unit that can provide integrated treatment including medication, group treatment, affect management strategies and opportunities to practice social engagement and conflict management." She noted that "[s]uch a unit does not now exist in Connecticut" and strongly encouraged that the petitioner be transferred to a new facility. In particular, Dr. Baranoski recommended a maximum security prison in Warren, Maine, that provides the treatment program she recommended for the petitioner.

Ultimately, "[t]he court imposed a sentence of seven years [of] incarceration, suspended after five and one-half years, and two years [of] probation to be served consecutively to the . . . sentence that he was then serving. The court thereupon ordered that the [petitioner] be remanded to the custody of the [respondent] instead of returned to Whiting." *Anderson II*, supra, 187 Conn. App. 580. In issuing the sentencing order, the court further "order[ed] that the [petitioner] receive mental health treatment to include a behavioral management approach or other specialized approach as recommended by Dr. Baranoski to include medication or in the alternative consideration for placement out of state at . . . the maximum security prison in Warren, Maine . . . referenced in Dr. Baranoski's report . . . ." On appeal, this court affirmed the petitioner's sentence. *Anderson II*, supra, 585–86.

On June 13, 2017, the petitioner filed a self-represented petition for a writ of habeas corpus, alleging that the conditions of his confinement were illegal because he was receiving constitutionally inadequate mental health treatment. Along with his petition, the petitioner simultaneously filed, with the assistance of a senior assistant public defender, a motion to refer his petition to the public defender's office for the appointment of counsel. On June 20, 2017, the court, *Oliver, J.*, granted the motion, and the petitioner's counsel filed her appearance on July 5, 2017.

On December 12, 2017, the petitioner filed an emergency motion for a temporary order seeking to compel the Department of Correction (department) to follow Dr. Baranoski's treatment recommendations contained in her report, which was attached as an exhibit. In his emergency motion, the petitioner offered allegations similar to those in his habeas petition and expanded on his claim that he was receiving constitutionally inadequate mental health treatment. In particular, the petitioner alleged that the department was not following Dr. Baranoski's treatment recommendations and had not undertaken any action to improve the petitioner's mental health. The motion further alleged that, instead, the department was subjecting the petitioner to extended periods of isolated confinement, directly contrary to Dr. Baranoski's recommendations. The petitioner also requested "an expedited hearing, in accordance with . . . *Anderson* [*I*]," on the emergency motion and quoted the portion of *Anderson I* entitling him to an expedited habeas petition to challenge the conditions of his confinement. See *Anderson I*, supra, 319 Conn. 299.

In response, on January 2, 2018, the respondent moved to consolidate the hearing on the petitioner's emergency motion with a trial on the merits of the habeas petition. The respondent argued that the relief sought in the petitioner's emergency motion was identical to the relief requested in his habeas petition. The respondent therefore contended that a subsequent trial would almost certainly result in duplicative submissions of identical evidence and a waste of judicial resources, thus necessitating a consolidation of both proceedings. The respondent also noted that he had no objection to an expedited habeas trial.

On January 5, 2018, the court, *Kwak, J.*, held a status conference at which the parties addressed the respondent's motion to consolidate. At the status conference, the petitioner objected to the motion to consolidate, arguing that the emergency motion requested separate remedies from those he sought by means of the habeas petition. In response, the respondent reiterated that, although there was no objection to holding an expedited trial, holding a separate hearing on the motion and a trial on the merits of the petition would result in two identical trials. The respondent then indicated that a consolidated proceeding would require at least one full day of trial. This prompted the following colloquy:

"The Court: At least a day?

"[The Petitioner's Counsel]: Yeah. It's basically, Your Honor, I believe the case would entail the testimony of competing expert witnesses and probably one or two fact witnesses from the [department].

"The Court: Okay. Well, if you need another day, then we'll have to pick another day but—or at least [an] available date. All right. [The petitioner], he's . . . grieved me previously. So, I don't know if I should be on this case or not, but . . . . So . . . the earliest date would be . . . . It was a January 26th date, but that's before me and obviously I can't do that.

"[The Petitioner's Counsel]: I see.

"The Court: So, let's see what the next [date] would be that'll be available.

"[The Respondent's Counsel]: So, I'm not opposing the notion of the next [date] to have a hearing in.

"The Court: Okay.

"[The Respondent's Counsel]: And if it has to be bifurcated with—in two parts, that's the way it'll be.

"The Court: Okay.

"[The Clerk]: Your Honor, we have a morning available on [January 30, 2018].

"The Court: Just a half day, though? . . . .

"[The Clerk]: [January 30]. We have a half a day.

"The Court: Do you want half a day or you want a full day?

"[The Petitioner's Counsel]: Well, I think probably it's going to take a whole day, but, you know, we, as the petitioner, will take what we can get.

"[The Respondent's Counsel]: We're not opposing any, you know, expedited—

"The Court: All right. Then, we'll take the half a day on January 30th, which is the earliest available."

Immediately following this discussion, the court adjourned. Judge Kwak never expressly granted the motion to consolidate, nor did he specify whether the scheduled court date would be a hearing on the emergency motion or a consolidated trial. On January 22, 2018, the respondent filed a return to the petition for a writ of habeas corpus, raising four special defenses: (1) the petitioner had not stated a claim for which relief can be granted; (2) the petitioner's injuries, if any, were not of a constitutional dimension; (3) the petitioner's claims were barred by res judicata or collateral estoppel; and (4) the habeas court lacked jurisdiction to order the petitioner returned to Whiting. On January 29, 2018, the petitioner filed a case flow request to reschedule the "hearing on emergency application for [a] temporary order" to February 1, 2018, which the court granted on January 30, 2018. As of February 1, 2018, the petitioner had not filed a reply to the respondent's return and the pleadings were not yet closed.[2]

On February 1, 2018, the habeas court, *Hon. Edward J. Mullarkey*, judge trial referee, commenced the proceeding, explaining that "[w]e have an emergency hearing today that was granted by—from the file, it's either

[2] Practice Book § 23-31 (a) provides: "If the return alleges any defense or claim that the petitioner is not entitled to relief, and such allegations are not put in dispute by the petitioner, the petitioner shall file a reply."

Judge Kwak or Judge Oliver. . . . And we're going to hold it today. And we're pretty much going to finish it today." The petitioner then presented testimony from Dr. Baranoski along with testimony from three mental health care professionals employed by the department: Mark Frayne, a supervising psychologist; Gerard Gagne, a psychiatrist; and Craig Burns, the director of psychiatric services for the department.

In the course of the proceeding, there was further discussion between the court and the attorneys that indicated the court's intent to hold only a shortened and expedited hearing, rather than a lengthy trial. Before the petitioner called Dr. Burns to testify, the court indicated that the petitioner should expect to finish presenting his evidence that day. In response, the petitioner's counsel raised concerns that she would not be able to complete her presentation of the evidence in that time frame.

Once Dr. Baranoski and the three other mental health professionals had testified, the petitioner wanted to have Dr. Baranoski respond to the testimony of the three mental health professionals, which prompted this colloquy:

"The Court: Is that going to be your last witness in this case?

"[The Petitioner's Counsel]: Today.

"The Court: No, in the case.

"[The Petitioner's Counsel]: I think that there is an open question about whether or not there are additional issues in this case. This case started out with a habeas. In that habeas, I filed an emergency motion. Judge—

"The Court: That some judge granted.

"[The Petitioner's Counsel]: Which the judge granted. That's why we're here today. Originally, we were supposed to have a half-day. Now, we've had a whole day.

[The respondent's counsel] filed a pleading . . . in which he took the position that the habeas itself and the emergency hearing should [be] collapsed into one matter.

"The Court: Yes. I read all of this stuff. . . . I got a simple question. You got any other witnesses?

"[The Petitioner's Counsel]: Not in this hearing, except that I would like to—

"The Court: What about the [department] officers [who've] been sitting outside all day?

"[The Petitioner's Counsel]: No.

"[The Respondent's Counsel]: So, that's an abuse of the subpoena, Your Honor. . . .

"The Court: No, no, no, no.

"[The Respondent's Counsel]: It's, it's, it's infuriating. I don't think that's a good faith use of the subpoena, quite frankly.

"The Court: We're not, we're not raising any more issues. This is an emergency hearing. It should be over . . . in the next half hour. . . . Otherwise it's not an emergency . . . and was mispleaded. . . .

"[The Petitioner's Counsel]: I would like to say—

"The Court: I don't care what you like. Sit down. You want to call Dr. Baranoski, you call her, but that will be . . . your last [witness]."

Thereafter, following arguments from counsel for both parties, the court issued its decision from the bench. The court concluded that the petitioner had failed to establish that the department was deliberately indifferent to his mental health. The court then concluded by holding: "[The] petitioner not having met his burden, the petition for [a] writ of habeas corpus is denied. You may have an exception." The court adjourned the proceeding immediately thereafter.

On February 13, 2018, the petitioner filed a motion for reconsideration, arguing that the proceeding on February 1, 2018, solely was a hearing on the petitioner's emergency motion and that the petitioner's procedural due process rights were violated because he had received no notice that the court would also be deciding his habeas petition and was denied a meaningful opportunity to be heard. The petitioner, therefore, requested that the court reconsider its decision and allow the petitioner sufficient time to prepare and present his argument in support of his habeas petition in the course of a full trial on its merits. The court granted the motion for reconsideration on February 15, 2018. In its order, the court reiterated that the petitioner had failed to meet his burden of proof and once again denied the habeas petition. On February 13, 2018, the petitioner filed a petition for certification to appeal, which the court granted on February 15, 2018. This appeal followed.[3]

On appeal, the petitioner claims that the habeas court violated his rights to procedural due process by denying the habeas petition without providing adequate notice that it was holding a trial on the merits of the habeas petition and without affording him a meaningful opportunity to be heard. We agree.

We begin with the standard of review and general principles relevant to the petitioner's procedural due process claim. "Whether the court violated the [petitioner's] constitutional procedural due process rights is a

[3] Specifically, the petitioner appeals from the judgments rendered on his emergency motion, his habeas petition, and his motion for reconsideration. Upon our review of the record, however, there is no indication that the habeas court ever rendered judgment on the emergency motion. Instead, it appears that, in the February 1, 2018 proceeding, the court's judgment addressed only the habeas petition. The petitioner's appeal from his emergency motion, therefore, is not properly before us due to the lack of a final judgment.

question of law over which our review is plenary." *Merkel* v. *Hill*, 189 Conn. App. 779, 786, 207 A.3d 1115 (2019). "[F]or more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. . . . It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner. . . . Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . Instead, due process is a flexible principle that calls for such procedural protections as the particular situation demands. . . . [T]hese principles require that a [party] have . . . an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." (Citation omitted; internal quotation marks omitted.) *In re DeLeon J.*, 290 Conn. 371, 378, 963 A.2d 53 (2009).

We agree with the petitioner that there was ambiguity as to whether the court proceeding scheduled for February 1, 2018, was a hearing on the emergency motion or a full trial on the merits of the habeas petition. During the status conference, Judge Kwak never formally granted the respondent's motion to consolidate, resulting in the petitioner's understandable uncertainty regarding the purpose of the subsequent proceeding. Moreover, the colloquy between the court and the respondent's counsel compounded the ambiguous nature of the proceedings. The respondent's counsel remarked that a consolidated proceeding would take at least one full day of trial while conceding that, "if it has to be bifurcated" to accommodate the court's schedule, "that's the way it'll be." The court thereafter scheduled the subsequent hearing for only one-half day, seemingly suggesting that it was bifurcating the adjudication of the emergency motion and the habeas petition per the respondent's request. Without further clarification from the respondent's counsel on what the "it" was that should be bifurcated, one reasonable assumption was that Judge Kwak had bifurcated the proceedings and, thus, the next court date would only be a hearing on the emergency motion. Furthermore, the petitioner sought a continuance solely for the "hearing on emergency application for [a] temporary order" to reschedule the hearing to February 1, 2018, which the court granted without clarification that it would schedule the habeas trial for that date as well.

Then, throughout the entirety of the February 1, 2018 proceeding, the habeas court repeatedly indicated that the matter before it was only an "emergency hearing" and limited the petitioner's ability to present evidence accordingly. The court itself, though, appeared conflicted on the status of the case when it later commented that "some judge [had] granted" the emergency motion, thereby suggesting that the emergency motion had already been resolved and the proceeding was, instead, an expedited habeas trial. Last, when the respondent raised several affirmative defenses in his return, the petitioner was entitled to file a reply to any of the claims that were not put in dispute by his habeas petition. See Practice Book § 23-31 (a). Pursuant to Practice Book § 23-35 (c), the petitioner should have had until February 22, 2018, to file a reply. The fact that the pleadings were not closed as of February 1, 2018, further supports the petitioner's belief that the proceeding scheduled for that date would not be a trial on his habeas petition.

Given these facts and the fundamental nature of the rights at issue in a petition for a writ of habeas corpus, we conclude that the ambiguities in the proceeding should be interpreted in favor of the petitioner.[4] The

[4] We recognize that, because we remand the case for further proceedings, factual issues resolved by the court during the underlying trial may well be relitigated. We express no opinion as to what, if any, effect should be given to the habeas court's factual findings. See footnote 1 of this opinion.

petitioner reasonably believed that he was proceeding solely on his emergency motion and that his habeas trial would occur at a later date. He, therefore, should not be precluded from an opportunity to succeed on the merits of his habeas petition. To hold otherwise would deprive the petitioner of his procedural due process rights to be duly notified of the nature of the pending proceeding and to present fully his evidence and arguments to the court.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

SARAH A. MOYHER *v.* PAUL J. MOYHER III (AC 41795)

DiPentima, C. J., and Keller and Flynn, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court dissolving his marriage to the plaintiff, and entering certain related financial orders. The trial court determined, referencing the applicable statute (§ 46b-81 (c)), that certain real property constituted marital property subject to equitable distribution. *Held:*

1. The defendant could not prevail on his claim that the trial court improperly found that certain real property located in New Hampshire was a marital asset and improperly awarded the plaintiff 40 percent of its value; the court explicitly referred to the factors in § 46b-81 (c) in determining that the New Hampshire property was marital property, considering the contributions both parties made in designing, building and maintaining the house, and the time spent there by both parties over the course of the marriage, and the court's award of 40 percent of the New Hampshire property to the plaintiff was not an abuse of discretion because the court found that the plaintiff contributed significantly to the finances of the marriage.
2. This court declined to review the defendant's unpreserved claim that the trial court abused its discretion in not allowing him to present evidence regarding an alleged prenuptial agreement between the parties: the trial court stated on the record that the defendant, prior to trial, had withdrawn his clam for enforcement of a prenuptial agreement, and, although, in his brief to this court, the defendant argued that he sought

to introduce evidence of a prenuptial agreement, and that, in chambers on the morning of trial, the court stated that it would not allow evidence of a prenuptial agreement to be presented because the defendant was unable to provide a signed agreement, there was nothing in the record to allow this court to review the defendant's claim; no objection was made on the record to the court's statement at the opening of trial that it would not consider evidence of the alleged prenuptial agreement, and the defendant neither offered the agreement as an exhibit for identification purposes nor made any offer of proof.

3. The trial court abused its discretion in ordering the defendant to pay the plaintiff her share of the New Hampshire property within five months of the dissolution judgment as the court did not properly consider the factors in § 46b-81 in making that order; the court noted that the defendant was an accountant but worked only sporadically throughout the marriage, and the court prohibited the defendant from encumbering the property, which prevented him from attempting to obtain a mortgage on the property to pay the judgment; in light of the defendant's lack of employment, assets or other sources of income, the court's order was an abuse of discretion.

Argued February 3—officially released June 23, 2020

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of New London, where the court, *Devine*, *J.*, rendered judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to this court. *Reversed in part*; *further proceedings.*

James E. Nealon, for the appellant (defendant).

Matthew G. Berger, with whom was *Lorraine Eckert*, for the appellee (plaintiff).

Opinion

DiPENTIMA, C. J. The defendant, Paul J. Moyher III, appeals from the judgment of the trial court dissolving his marriage to the plaintiff, Sarah A. Moyher, and entering related financial orders. On appeal, the defendant claims that the court abused its discretion by (1) finding that certain real property located in New Hampshire was a marital asset and awarding the plaintiff 40 percent of its value, (2) not allowing the defendant to present evidence at trial regarding a prenuptial agreement between the parties, and (3) ordering the defendant to pay the plaintiff her awarded share of the New Hampshire real property, $150,750 plus interest, within five months of the dissolution judgment. We disagree with the defendant's first two claims; however, we agree that the court abused its discretion in ordering the defendant to pay the plaintiff her share of the New Hampshire property within five months of the dissolution judgment. Accordingly, we reverse that part of the judgment of the trial court and remand for further proceedings in accordance with this opinion.

The following facts, as found by the trial court, and procedural history are relevant to this appeal. The parties were married on November 4, 2006, in East Haddam and did not have any children. By complaint dated July 7, 2016, the plaintiff sought a dissolution of the marriage and a fair division of property and debts. The defendant then filed an answer admitting all of the allegations in the plaintiff's complaint and a cross complaint seeking a fair division of the property and debts, alimony and enforcement of the parties' prenuptial agreement.[1]

On September 7, 2017, the court, *Devine, J.*, rendered judgment dissolving the parties' marriage and entered financial orders in a memorandum of decision. The court determined that a house, located near the Canadian border at 218 Spooner Road, Pittsburgh, New Hampshire (New Hampshire property), constituted marital property subject to equitable distribution. This determination is at the center of this appeal.[2]

[1] Prior to the start of trial, the defendant withdrew his claim for enforcement of an alleged prenuptial agreement.

[2] After this appeal was ready for argument, the defendant filed a motion to open the judgment in the trial court, alleging fraud and mutual mistake. The trial court denied the motion on December 17, 2019, and the defendant appealed that decision; this court subsequently rejected the defendant's appeal. See *Moyher* v. *Moyher*, Docket No. AC 43927 (appeal rejected February 13, 2020).

We begin by setting forth the well settled standard of review. "An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Furthermore, [t]he trial court's findings [of fact] are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. (Internal quotation marks omitted.) *Merk-Gould* v. *Gould*, 184 Conn. App. 512, 516–17, 195 A.3d 458 (2018).

I

First, the defendant claims that (1) the trial court's finding that the New Hampshire property was marital property was clearly erroneous and (2) the court's award of 40 percent of the property to the plaintiff was an abuse of discretion. We disagree.

In 2001, prior to the marriage but during his relationship with the plaintiff, "the defendant purchased a parcel of land in New Hampshire intended for snowmobiling. The defendant took out a mortgage to purchase the lot and later a construction mortgage in the amount of $149,000. The plaintiff and the defendant both enjoyed snowmobiling and other activities as evidenced by their purchase of multiple snowmobiles and other winter vehicles. The land was cleared by the plaintiff, the defendant and mutual friends. The house was designed with input from both and a builder friend with [subcontractors performing] the framing and roofing. The parties worked on the floors together [and] the defendant and a friend [performed] the plumbing and electrical work. The plaintiff requested that her name be added to the deed and mortgage but the defendant refused." (Footnote omitted.) The court noted that the plaintiff also spent significant time traveling to the New Hampshire property "from her various places of employment to be with the defendant on the weekends in the winter to cook, clean and enjoy the snowmobiling . . . with the defendant. She worked all week during the year, but traveled to New Hampshire during the winter weekends from Connecticut, Pennsylvania and/or Massachusetts."

The court further found that the plaintiff made "substantial contributions to the pay down of the New Hampshire lot purchase and mortgage resulting in a total payoff and release by 2012." Indeed, "[a]ll of [the plaintiff's] income went to [the defendant's] bank account to pay triple mortgage payments on the defendant's New Hampshire home and other bills . . . ."

Although a trial court is afforded broad discretion when distributing marital property, it must take into account several statutory factors when making its determination. See *Greco* v. *Greco*, 275 Conn. 348, 354–55, 880 A.2d 872 (2005). These factors are enumerated in General Statutes § 46b-81 (c). Section 46b-81 (c) provides: "In fixing the nature and value of the property, if any, to be assigned, the court, after considering all the evidence presented by each party, shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocation skills, education, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates." Although the trial court "need not give every factor equal weight . . . or recite the statutory criteria that it considered in making its decision or make express findings as to each statutory factor, it must take each into account." (Internal quotation marks omitted.) *Greco* v. *Greco*, supra, 275 Conn. 355.

In its memorandum of decision, the court explicitly referred to the factors set forth in § 46b-81(c) in determining that the New Hampshire property was marital property. The court properly considered the contributions, financial and otherwise, that both parties had made in designing, building and maintaining the house. The court particularly noted the substantial financial contributions the plaintiff made that allowed the defendant to make triple payments on his construction mortgage. The court also considered the time spent there by both parties over the course of the marriage. Therefore, the finding that the New Hampshire property was marital property subject to distribution was not clearly erroneous.

Further, the court's award of 40 percent of the New Hampshire property to the plaintiff was not an abuse of discretion. Not only did the court find that the plaintiff had contributed significantly to the planning, funding and maintaining of the New Hampshire property, the court found that the plaintiff had contributed significantly to the finances of the marriage. The court stated that "[t]he plaintiff's contributions of income from 2007 to 2017 totals approximately $593,000. All of her net income from employment deposited into the defendant's checking account has been spent. The plaintiff has contributed substantially more money than the defendant to the marriage debts and expenses. The defendant's employment net income from 2004 to present is dwarfed by that of the plaintiff." Accordingly, we reject the defendant's first claim.

II

Next, the defendant claims that the court abused its discretion by not allowing him to present evidence at trial regarding a prenuptial agreement between the parties, which would have precluded her from receiving any interest in the New Hampshire property. Because this claim was not preserved at trial, we decline to review it.

"Our appellate courts, as a general practice, will not review claims made for the first time on appeal. . . . [A]n appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . [B]ecause our review is limited to matters in the record, we [also] will not address issues not decided by the trial court. . . . The purpose of our preservation requirements is to ensure fair notice of a party's claims to both the trial court and opposing parties. . . . These requirements are not simply formalities. They serve to alert the trial court to potential error while there is still time for the court to act. . . . The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." (Internal quotation marks omitted.) *Guddo* v. *Guddo*, 185 Conn. App. 283, 286–87, 196 A.3d 1246 (2018). See Practice Book § 60-5 (providing that appellate court is not bound to consider claim that is not distinctly raised at trial or arising subsequent to trial).

In its memorandum of decision, the court states that "[t]he defendant, prior to the commencement of the trial, withdrew his claim for enforcement of an alleged prenuptial agreement." At the start of trial, the court stated the following on the record: "[An] issue came up about apparently there was a cross complaint filed by the defendant, seeking enforcement of an antenuptial or prenuptial agreement. Counsel have indicated to me that that's not [going to] be raised in the case. I should state for the record that I did read what was purported to be a prenuptial agreement, which apparently was not signed by all of the parties. The court will then as a matter of law, disregard it. And, as a matter of fact, not take it into any consideration in this case." In his brief, the defendant states that he sought to introduce evidence at trial that a prenuptial agreement signed by both parties existed and "that its disappearance under the circumstances presented strongly supported the inference that [the] plaintiff had likely played some role in its disappearance." The defendant further states that in chambers the morning of trial, the court stated that it would not allow evidence of a prenuptial agreement to be presented because the defendant was unable to provide evidence of a signed agreement. Notwithstanding the defendant's argument in his brief, there is nothing in the record that allows us to review this claim. No objection was made on the record to the court's statement at the opening of trial, and the defendant neither offered the agreement as an exhibit for identification purposes nor made any offer of proof. Further, no motion for rectification was filed pursuant to Practice Book § 66-5 to attempt to preserve the discussions in chambers. See *State* v. *McIntyre*, 242 Conn. 318, 332–33, 699 A.2d 911 (1997) (noting that discussions held in chambers that are not reflected on record cannot displace rulings on record). Thus, the defendant failed to properly preserve the claim of the existence of a signed prenuptial agreement for our review. Accordingly, we decline to review the plaintiff's claim.

III

Finally, the defendant claims that, even if this court affirms the trial court's distribution of the marital property, the court abused its discretion by ordering the defendant to pay the plaintiff her awarded share of the New Hampshire property, $150,750 plus interest, within five months of the dissolution judgment. We agree.

As discussed previously in this opinion, while the court has broad discretion in fashioning financial awards, it must consider certain factors enumerated in § 46b-81 in determining the award. *Greco* v. *Greco*, supra, 275 Conn. 354–55. These factors include "the age, health, station, occupation, amount and sources of income, earning capacity, vocation skills, education, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income." General Statutes § 46b-81. Further, although the trial court "need not give every factor equal weight . . . it must take each into account." (Internal quotation marks omitted.) *Greco* v. *Greco*, supra, 355.

Although the court properly considered these factors in determining that the New Hampshire property was marital property and in determining the plaintiff's share, it did not do so when it ordered the defendant to pay the plaintiff her awarded share within five months of the dissolution judgment. It is well settled that "the defendant's ability to pay is a material consideration in formulating financial awards." (Internal quotation marks omitted.) *Pellow* v. *Pellow*, 113 Conn. App. 122, 129, 964 A.2d 1252 (2009).

The court noted that the defendant was an accountant but had worked only sporadically and on a part-time basis throughout the marriage. It further noted that at the time of trial the defendant was unemployed and had not worked since November, 2016. The defendant testified that he planned to find employment after the divorce was completed, but did not state that he had any definite leads on job opportunities. The court found that the defendant's net income from employment from 2004 to the time of trial was "dwarfed by that of the plaintiff" and, at the end of the marriage, the parties had little to no cash reserves or assets, apart from the New Hampshire property.[3] Further, the court prohibited the defendant from encumbering the property, which prevented him from attempting to obtain a mortgage on the property to pay the judgment.

In light of the defendant's lack of employment, assets or other sources of income, including his inability to mortgage the property, and his sporadic employment history, the court's order that the defendant pay the plaintiff's award within five months of the dissolution judgment was an abuse of discretion. Accordingly, we reverse the trial court's order that the defendant pay the plaintiff her share of the New Hampshire property within five months of the dissolution judgment.

Financial orders "in dissolution proceedings [have been characterized] as resembling a mosaic, in which all the various financial components are carefully interwoven with one another. . . . Accordingly, when an appellate court reverses a trial court judgment on the basis of an improper alimony, property distribution, or child support award, the appellate court's remand typically authorizes the trial court to reconsider all financial orders. . . . We also have stated, however, that [e]very improper order . . . does not necessarily merit a reconsideration of all the trial court's financial

[3] Both the defendant's father and the plaintiff's mother made significant financial contributions to both parties throughout the marriage. The defendant's father gave cash gifts to both parties and the plaintiff's mother funded a bank account, originally created for the plaintiff's use during college, which was accessible to both parties. At the time of trial, however, the parties were without any cash reserves, despite these sources of income.

orders. A financial order is severable when it is not in any way interdependent with other orders and is not improperly based on a factor that is linked to other factors. . . . In other words, an order is severable if its impropriety does not place the correctness of the other orders in question. . . . Determining whether an order is severable from the other financial orders in a dissolution case is a highly fact bound inquiry." (Internal quotation marks omitted.) *Merk-Gould* v. *Gould*, supra, 184 Conn. App. 523.

In the present case, we conclude that the court's order that the defendant pay the plaintiff's award within five months of the dissolution judgment is severable from the court's other determinations. The other financial orders related to personal property and the court's order that the plaintiff pay the defendant alimony, neither of which were challenged on appeal. The court's determination that the New Hampshire property was marital property is neither interdependent with the other orders nor was it based on a factor linked to other orders. Accordingly, we conclude that the court on remand is limited to its consideration of the payment order.

The judgment is reversed with respect to the order that the defendant pay the plaintiff her portion of the marital property within five months of the dissolution judgment and the case is remanded for further proceedings in accordance with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

EDWARD V. DAVIS *v.* COMMISSIONER OF CORRECTION (AC 42372)

Keller, Elgo and Eveleigh, Js.

Syllabus

The petitioner, who had been convicted of various crimes, including bribery of a witness, in connection with a traffic incident, sought a writ of habeas corpus, claiming that his trial counsel and appellate counsel rendered ineffective assistance. The petitioner claimed that counsel, inter alia, improperly failed to challenge the bribery statute (§ 53a-149) as unconstitutionally overbroad on its face because it arguably could encompass legal activity. The petitioner further claimed that his trial counsel failed to request a jury instruction on true threats with respect to the petitioner's conviction under the statute (§ 53a-181 (a) (3)) criminalizing breach of the peace in the second degree and that his appellate counsel failed to challenge that decision on direct appeal. The petitioner's conviction stemmed from an incident in which he drove his truck into a vehicle driven by J that was stopped at a traffic signal, causing damage. When J rejected the petitioner's offer to pay him for the damage, the petitioner, who was intoxicated, became agitated and stated to J, "Why don't we pull over to the side and settle it like men?" J then observed the petitioner yelling and banging on J's car window while J was calling the police. When the police arrived, an officer found the petitioner lying face down in the boat attached to the rear of the truck. The petitioner's skin was cold and appeared blue or purple, his clothing was wet, and he yelled and cursed at the police and ambulance personnel who attempted to treat him. The police told the emergency medical technician who responded to the scene to take the petitioner to a hospital, where the petitioner was admitted and his blood was drawn and tested. The state issued a subpoena after the petitioner was discharged from the hospital and obtained his blood test results, which were admitted into evidence. The habeas court rendered judgment denying the petition. *Held*:

1. The petitioner's claim that his trial counsel and appellate counsel rendered ineffective assistance for having failed to challenge the bribery statute as facially overbroad was without merit:

   a. The petitioner could not prevail on his claim that his trial counsel rendered ineffective assistance by failing to pursue the novel constitutional argument that § 53a-149 was overbroad because it could encompass legal activity such as civil settlement negotiations, as that theory was untested in this state's courts and, thus, fatal to the petitioner's ability to establish prejudice; the chances of success in advancing novel legal theories are purely speculative, a petitioner must do more than proffer a speculative outcome to establish prejudice, and a conclusion that counsel rendered ineffective assistance as a result of the manner in which he argued that theory would produce absurd results.

b. The trial court properly concluded that appellate counsel did not render deficient performance but employed well reasoned and researched lines of argument, as counsel believed that the case concerned how common people would view § 53a-149 as inapplicable to the petitioner's case, counsel was not obligated to raise every conceivable claim on appeal, counsel pursued the claims he believed were the strongest on the basis of his review of the law and the trial record, and, as a claim that § 53a-149 was overbroad was as novel a theory on appeal as it was at trial, this court did not need to address whether the petitioner was prejudiced.

2. The petitioner could not prevail on his claim that his counsel rendered ineffective assistance by failing to request at trial and to argue on direct appeal that the trial court should have given the jury an instruction on true threats with respect to the charge of breach of the peace in the second degree:

a. Contrary to the assertion by the respondent Commissioner of Correction, the petitioner's claim was properly before this court, the habeas court having concluded that the petitioner's speech amounted to fighting words, which may be criminalized under § 53a-181 (a) (3), and the petitioner challenged that determination by arguing that it ignored the state's theory as presented to the jury.

b. The habeas court properly determined that the petitioner failed to prove that he was prejudiced by the lack of a true threats instruction, as the first amendment was not implicated because the petitioner's course of conduct, rather than his speech, was the predicate for the charge under § 53a-181 (a) (3), and, although a defendant is entitled to a true threats instruction only when his statements constitute a true threat, the petitioner failed to establish that it was reasonably probable that, had such an instruction been given, the result of his trial would have been different.

c. This court declined to review the petitioner's claim that his appellate counsel was ineffective for not having asserted that the trial court improperly failed to give the jury an instruction on true threats as to the charge under § 53a-181 (a) (3): the petitioner's claim was not properly before this court, as his habeas petition did not distinctly allege that claim, and that claim was not inextricably linked to the claim in the habeas petition that appellate counsel rendered ineffective assistance for having failed to challenge § 53a-181 (a) as facially overbroad and unconstitutionally vague as applied.

3. The petitioner's claim that his trial counsel and appellate counsel rendered ineffective assistance for having failed to challenge the admission into evidence of the petitioner's blood test results was unavailing:

a. There was no merit to the petitioner's assertion that trial counsel was ineffective for having failed to pursue a motion to suppress the blood test results, which was based on the petitioner's claim that the state failed to satisfy the statutory (§ 14-227a (k)) grounds for their admission into evidence; the petitioner's position was contradicted by the record and his own admission that counsel pressed the trial court to preclude the blood test results pursuant to § 14-227a (k) and, although the court rejected counsel's claim that § 14-227a (k) was the exclusive method for the admission of the blood test results in a prosecution under § 14-227a, counsel's unsuccessful attempt to convince the court did not constitute deficient performance.

b. Appellate counsel's decision not to challenge the admission into evidence of the results of the petitioner's blood tests was sound strategy, and the petitioner failed to prove that he was prejudiced by that decision: counsel was not deficient in choosing not to challenge the admission of the blood test results under § 14-227a (k), as he cited case law that a failure to satisfy the requirements of § 14-227a (k) did not foreclose the admission of blood test results under § 14-227a, and case law at the time of the petitioner's direct appeal supported counsel's view that the absence of facts about the hospital's decision to take a blood sample from the petitioner made a fourth amendment claim difficult; moreover, there was an absence of evidence during the habeas trial that the petitioner's claim would have succeeded, as there was little to suggest that the petitioner's transfer to and treatment at the hospital was a pretext to gather evidence against him, there was no evidence that the police requested that the hospital draw the petitioner's blood, and a vast amount of evidence suggested that the request by the police that the petitioner be taken to the hospital was based on a genuine concern for his health.

Argued December 4, 2019—officially released June 23, 2020

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Hon. Edward J. Mullarkey*, judge trial referee; judgment denying the petition, from which, the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Damian K. Gunningsmith, for the appellant (petitioner).

Rocco A. Chiarenza, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Jo Anne Sulik*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

ELGO, J. The petitioner, Edward V. Davis, appeals from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. In this certified appeal, the petitioner claims that the court improperly rejected his claims of ineffective assistance of both trial and appellate counsel for their failure (1) to challenge General Statutes § 53a-149 as unconstitutionally overbroad on its face with respect to the charge of bribery of a witness, (2) to request a jury instruction on "true threats" with respect to the charge of breach of the peace in the second degree under General Statutes § 53a-181 (a) (3), and (3) to challenge the admissibility of the petitioner's blood test results from the hospital where he was taken after the traffic incident at issue. We affirm the judgment of the habeas court.

The following facts underlying the petitioner's conviction, as set forth by this court in his direct appeal, are relevant to our resolution of this appeal. "On November 20, 2010, the [petitioner] and his stepson, Jonathan Oakes, were boating on the Connecticut River. While on the boat, the [petitioner] consumed eight or nine beers. In the late afternoon, the two returned the boat to a boat launch in East Hartford, loaded it onto a trailer attached to the [petitioner's] truck, and drove away. At approximately 4:50 p.m., the [petitioner] and Oakes stopped at a liquor store and purchased a bottle of Peppermint Schnapps. The [petitioner] later admitted to a police officer that he had personally consumed almost a liter of Peppermint Schnapps.

"At approximately 5:30 p.m., while driving his truck on Route 83 in Manchester, the [petitioner] collided with a vehicle that had been stopped at a traffic signal. The driver of the other vehicle, Paul Jarmoszko, testified that he initially heard tires screech and then felt 'a jolt and the car got pushed forward . . . a few feet.'

After the accident, Jarmoszko and the [petitioner] exited their respective vehicles. Jarmoszko immediately went to inspect the damage on the rear of his vehicle, while the [petitioner] inspected his boat. Shortly after inspecting his boat, the [petitioner] met Jarmoszko between the two vehicles.

"After observing the damage to Jarmoszko's vehicle, the [petitioner] offered to pay him a 'couple of hundred bucks . . . .' Jarmoszko rejected the offer, at which point the [petitioner] 'got agitated and said something [to the effect of] this is how it's going to be? Why don't we pull over to the side and settle it like men?' Jarmoszko, believing the [petitioner] wanted to fight him, told the [petitioner] he was going to contact the police and got back into his vehicle to place the phone call. While speaking to the police, Jarmoszko observed the [petitioner] bang on his car's window several times, yell and then walk away. Jarmoszko later heard the engine of the [petitioner's] truck start.

"Shortly afterward, Michael Magrey, a Manchester police officer, was dispatched to the scene of the accident. Magrey parked his police cruiser behind the truck and approached the vehicle's driver's side. He observed a single occupant in the driver's seat of the truck who was revving the vehicle's engine and 'appeared to be out of it, under the influence of something.' This individual was later identified as Oakes. Magrey asked Oakes to turn the truck's engine off, hand over the keys and step out of the vehicle. Oakes followed the officer's instructions and sat on the curb.

"Magrey then went to make sure that Jarmoszko was not injured. During his interaction with Jarmoszko, Magrey was informed that Oakes was not the person Jarmoszko had observed exiting the driver's side door after the accident. On the basis of this information, Magrey asked Oakes where his companion was located, to which Oakes responded that he was 'in the back.' The officer eventually located the [petitioner] lying down inside the boat. His skin appeared blue or purple, was cold to the touch, and his clothing was wet. Although initially unresponsive to questioning, the [petitioner's] demeanor changed drastically. He became hostile and belligerent toward Magrey, yelling and cursing at him. Magrey testified that the [petitioner] kept 'coming at me' and he had to 'put [the petitioner] in an arm bar [to] keep him down.' Eventually, another officer got into the boat and was able to assist Magrey in placing handcuffs on the [petitioner]. The [petitioner] remained in this state of belligerence, attempting to spit on Magrey and ambulance personnel who were attempting to treat him. He was placed on a hospital gurney, while in restraints, and taken to Manchester Hospital for treatment. The [petitioner] was treated and later released from the hospital.

"Medical records from the [petitioner's] treatment at the hospital revealed that he had a blood alcohol content of 0.165. The [petitioner] was subsequently arrested by officers of the Manchester Police Department. While in police custody, the [petitioner] admitted to Magrey that he had spoken to Jarmoszko after the accident and had offered him money in order to avoid police involvement. During this discussion, the [petitioner] further admitted to having consumed almost a liter of Peppermint Schnapps prior to the accident.

"The state charged the [petitioner] with the following counts in the part A information: (1) driving under the influence, (2) bribery of a witness, (3) threatening in the second degree, (4) breach of the peace in the second degree and (5) interfering with an officer. The state also charged the [petitioner], under the part B information, with being a third time offender. The part A counts were tried to a jury and, at the conclusion of trial, a verdict of guilty was returned on all counts with the exception of the threatening count.[1] Afterward, the state proceeded on the part B information and the case was tried to the court. At the conclusion of trial, the court found the [petitioner] guilty on the count of being a third time offender." (Footnotes omitted; footnote added.) *State* v. *Davis*, 160 Conn. App. 251, 254–57, 124 A.3d 966, cert. denied, 320 Conn. 901, 127 A.3d 185 (2015). The petitioner was sentenced to a total effective term of ten years of imprisonment, execution suspended after four years, followed by five years of probation with special conditions. In his direct appeal, the petitioner claimed that (1) § 53a-149 is unconstitutionally vague as applied, (2) there was insufficient evidence to support the guilty finding with respect to the count of being a third time offender under General Statutes § 14-227a, and (3) there was insufficient evidence to support the guilty verdict on the count of bribery of a witness. See id., 253–54.

Following an unsuccessful direct appeal of his conviction, the petitioner commenced the underlying habeas action. In his operative petition for a writ of habeas corpus, his November 16, 2017 revised amended petition, the petitioner alleged one count of ineffective assistance of trial counsel, Attorney Stephen F. Cashman, and one count of ineffective assistance of appellate counsel, Attorneys Peter G. Billings and Sean P. Barrett. Each count alleged various deficiencies with respect to counsel's representation of the petitioner. Following a trial, the habeas court denied the petition for a writ of habeas corpus, finding no merit to the various claims of ineffective assistance allegedly rendered by both trial and appellate counsel. The court subsequently granted the petition for certification to appeal, and this appeal followed.

[1] The court granted the petitioner's motion for a judgment of acquittal on the threatening count.

We begin by setting forth the standard of review and relevant principles of law that govern our resolution of the petitioner's appeal. "The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . Historical facts constitute a recital of external events and the credibility of their narrators. . . . Accordingly, [t]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of the witnesses and the weight to be given to their testimony. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Citations omitted; internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 677, 51 A.3d 948 (2012).

"The sixth amendment to the United States constitution guarantees a criminal defendant the assistance of counsel for his defense. . . . It is axiomatic that the right to counsel is the right to the effective assistance of counsel." (Citation omitted; internal quotation marks omitted.) *Ledbetter* v. *Commissioner of Correction*, 275 Conn. 451, 458, 880 A.2d 160 (2005), cert. denied sub nom. *Ledbetter* v. *Lantz*, 546 U.S. 1187, 126 S. Ct. 1368, 164 L. Ed. 2d 77 (2006). "To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Strickland* requires that a petitioner satisfy both a performance and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . Although a petitioner can succeed only if he satisfies both prongs, a reviewing court can find against the petitioner on either ground." (Citations omitted; internal quotation marks omitted.) *Breton* v. *Commissioner of Correction*, 325 Conn. 640, 668–69, 159 A.3d 1112 (2017).

"We . . . are mindful that [a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . [C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. . . . Similarly, the United States Supreme Court has emphasized that a reviewing court is required not simply to give [counsel] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he or she] did. (Citations omitted; internal quotation marks omitted.) *Ricardo R.* v. *Commissioner of Correction*, 185 Conn. App. 787, 796–97, 198 A.3d 630 (2018), cert. denied, 330 Conn. 959, 199 A.3d 560 (2019).

"In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. . . . Instead, *Strickland* asks whether it is reasonably likely the result would have been different. . . . The likelihood of a different result must be substantial, not just conceivable." (Internal quotation marks omitted.) *Skakel* v. *Commissioner of Correction*, 329 Conn. 1, 40, 188 A.3d 1 (2018). "In a habeas proceeding, the petitioner's burden of proving that a fundamental unfairness had been done is not met by speculation . . . but by demonstrable realities." (Internal quotation marks omitted.) *Sanders* v. *Commissioner of Correction*, 169 Conn. App. 813, 834, 153 A.3d 8 (2016), cert. denied, 325 Conn. 904, 156 A.3d 536 (2017).

The two-pronged test set forth in *Strickland* equally applies to claims of ineffective assistance of appellate counsel. See *Camacho* v. *Commissioner of Correction*, 148 Conn. App. 488, 494–95, 84 A.3d 1246, cert. denied, 311 Conn. 937, 88 A.3d 1227 (2014). Although appellate counsel must provide effective assistance, "he [or she] is not under an obligation to raise every conceivable issue. A brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions. . . . Indeed, [e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. . . . Most cases present only one, two, or three significant questions. . . . The effect of adding weak arguments will be to dilute the force of stronger ones. . . . Finally, [i]f the issues not raised by his appellate counsel lack merit, [the petitioner] cannot sustain even the first part of this dual burden since the failure to pursue unmeritorious claims cannot be considered conduct falling below the level of reasonably competent representation." (Internal quotation marks omitted.) Id., 495. To establish that the petitioner was prejudiced by appellate counsel's ineffective assistance, the petitioner must show that, but for the ineffective assistance, "there is a reasonable probability that, if the issue were brought before us on direct appeal, the petitioner would have prevailed. . . . To ascertain whether the petitioner can demonstrate such a probability, we must consider the merits of the underlying claim." (Citation omitted.) *Small* v. *Commissioner of Correction*, 286 Conn. 707, 728, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008).

I

The petitioner first claims that both trial and appellate counsel rendered ineffective assistance by failing to challenge our bribery statute, § 53a-149,[2] as unconstitutionally overbroad on its face.[3] According to the petitioner, effective counsel would have recognized that § 53a-149 was susceptible to an overbreadth challenge because it arguably could encompass legal activity—specifically, civil settlement negotiations. We disagree.

The following additional facts are relevant to the resolution of this claim. During the petitioner's criminal trial, Cashman elicited testimony from Jarmoszko on cross-examination that Jarmoszko believed the petitioner's offer was an attempt to settle a property damage claim. According to Jarmoszko, he did not believe that the offer was enough to settle that claim. In his closing argument to the jury, Cashman argued that the case was not about bribery but, instead, concerned a property damage claim related to a motor vehicle accident. Cashman also asserted that, if the petitioner's offer to Jarmoszko constituted a bribe under § 53a-149, every insurance claim that is settled out of court also would fall under that statute.

[2] General Statutes § 53a-149 provides in relevant part: "(a) A person is guilty of bribery of a witness if he offers, confers or agrees to confer upon a witness any benefit to influence the testimony or conduct of such witness in, or in relation to, an official proceeding. . . ."

[3] For clarity, we address each claim in turn concerning both trial and appellate counsel.

In its charge concerning bribery, the court instructed the jury on the definitions of "witness" and "official proceeding" under the factual circumstances as follows: "[I]n this case, the state alleges that [Jarmoszko] was to be a witness in one or more criminal proceedings that could arise out of the incident on November 20, 2010."

In the petitioner's direct appeal, Billings argued that the bribery statute was unconstitutionally vague as applied to the petitioner. Specifically, Billings argued in his appellate brief that the terms "witness" and "official proceeding" encompass "such a wide range of time, people and activity that it is impossible to know that the conduct in this case would constitute a violation of § 53a-149." After outlining the statutory definitions and related case law, Billings argued that "[n]either the statutory language nor the tangentially related case precedent demonstrates any expectation that a prosecution for bribery of a witness would arise from the facts of this case."

During the habeas trial, Cashman and Billings both testified about their tactics in defending against the bribery charge. For instance, Cashman testified to his belief that the best defense was to argue to the jury that the bribery statute was inapplicable to the petitioner's situation. According to Cashman, his theory was that the petitioner was merely offering $200 to Jarmoszko for the damage the petitioner caused to his car. Cashman testified that the crux of his argument was that the petitioner's offer of money to Jarmoszko was nothing more than an attempt to settle a civil matter, and, thus, the jury would find that the bribery statute did not encompass the petitioner's conduct. Billings testified in a similar vein, stating that, although he understood the difference between an overbreadth challenge and a vagueness challenge, he did not view the circumstances as implicating the first amendment. Instead, Billings believed that the issue concerned how a common person in society would not view the petitioner's conduct as rising to the level of bribery and that he therefore believed that attacking the statute as vague as applied to the petitioner was the most promising claim.

In its memorandum of decision, the habeas court found no merit in the petitioner's claim that failing to challenge § 53a-149 as facially overbroad constituted ineffective assistance of counsel. It found that, with respect to appellate counsel, Billings had "employed well reasoned and researched lines of argument." Specifically, the court noted that Billings, "[acting] within his discretion, selected claims to raise on appeal and the lack of success on appeal, or not raising more or different claims, does not prove ineffective assistance."[4]

[4] We note that the court did not provide any articulation or discussion in rejecting the petitioner's claim that *trial counsel* rendered ineffective assistance for failing to challenge the bribery statute as overbroad. Rather, the court merely acknowledged that claim, along with the claim that trial counsel was deficient for failing to challenge the breach of the peace statute as both unconstitutionally vague and overbroad—a claim that is not the subject of this appeal—by referencing the relevant paragraphs in the habeas petition. The court framed those claims in tandem as "a failure to attack the constitutionality of the bribery and breach of the peace statutes on their faces." The court then noted the petitioner's claim of ineffective assistance of trial counsel for failing to request a jury instruction on the petitioner's speech or to take an exception to the court's instruction because his speech "could not constitute a basis for a breach of peace unless it constituted "fighting words." In rejecting these challenges, the court concluded that attacking the statutes as vague would have proven meritless. It further concluded that the petitioner's conduct constituted fighting words. See part II of this opinion. Furthermore, the court did not articulate whether its finding that the petitioner used fighting words concerned the deficient performance prong or the prejudice prong of *Strickland*.

Neither party has brought this issue to our attention, nor has either party asserted that the court failed to make a determination on the petitioner's claim. Furthermore, there is no dispute that the court denied the petitioner's habeas petition in its entirety. "[T]o the extent that the trial court's memorandum of decision may be viewed as ambiguous in this respect, we read an ambiguous record, in the absence of a motion for articulation, to support rather than to undermine the judgment." *Water Street Associates Ltd. Partnership* v. *Innopak Plastics Corp.*, 230 Conn. 764, 773, 646 A.2d 790 (1994).

On our review of the record before us, we conclude that the court implicitly

A

We agree with the habeas court's conclusion that the petitioner's claim with respect to trial counsel is without merit due to his failure to establish prejudice. See footnote 4 of this opinion. According to the petitioner, trial counsel's assistance was deficient for failing to raise a theory or claim that was untested in our courts. In other words, the petitioner takes issue with his counsel's failure to assert a novel theory that has neither been presented to, nor accepted by, the courts of this state. As our Supreme Court has held, "counsel's failure to advance novel legal theories or arguments does not constitute ineffective performance." *Ledbetter* v. *Commissioner of Correction*, supra, 275 Conn. 461. "To conclude that counsel is obligated to recognize and to preserve previously undecided constitutional claims, the viability of which is purely speculative, would be to require criminal defense lawyers to possess a measure of clairvoyance that the sixth amendment surely does not demand." Id., 462. Thus, the failure of counsel to pursue a novel constitutional argument does not constitute ineffective assistance. See id., 457, 462 (counsel did not render ineffective assistance by failing to

rejected the petitioner's claim under the prejudice prong when it determined that attacking the bribery statute on vagueness grounds would have been meritless. As noted previously, the court's conclusion was made in the same paragraph and immediately after it acknowledged the petitioner's claim concerning trial counsel's failure to challenge the bribery statute as unconstitutional. See *Ricardo R.* v. *Commissioner of Correction*, supra, 185 Conn. App. 789 n.1 ("[a]lthough the habeas court did not explicitly address whether the petitioner's trial counsel had performed deficiently for not consulting with an expert in preparation of the cross-examination . . . it is clear that [it] implicitly rejected this claim when it determined that counsel had made a sound, strategic decision not to hire an expert for the petitioner's criminal trial"). Therefore, it appears that the court determined that the petitioner failed to prove prejudice but did not articulate its basis for its conclusion. Irrespective of that omission, we conclude that the record is adequate to review the determination that the petitioner failed to establish prejudice under *Strickland*. See *Small* v. *Commissioner of Correction*, supra, 286 Conn. 716–17.

preserve novel argument that juvenile's written confession, obtained without warning that juvenile might be tried as adult, violated state constitution).

The petitioner nevertheless argues that, because Cashman acknowledged that his theory of defense could be interpreted as an overbreadth challenge to the bribery statute, Cashman rendered ineffective assistance by making that argument to the jury. According to the petitioner, the jury "was indisputably the wrong audience for such a legal argument," and, instead, Cashman should have made that argument to the trial court. We reject that assertion. Whether the trial court was the correct audience does nothing to vitiate our law governing claims of ineffective assistance of counsel for a failure to assert novel legal theories. See *Ledbetter* v. *Commissioner of Correction*, supra, 275 Conn. 461 ("while the failure to advance an established legal theory may result in ineffective assistance of counsel under *Strickland*, the failure to advance a novel theory never will" (internal quotation marks omitted)). The petitioner asks this court to rule that, even though failing to raise a novel theory would not constitute ineffective assistance under *Strickland*, counsel could render ineffective assistance by the manner in which he or she argues that theory. Such a conclusion would produce absurd results.

More importantly, our conclusion rests on the legal principle that, in order to satisfy the prejudice prong under *Strickland*, the petitioner must do more than proffer a speculative outcome. See *Santos* v. *Commissioner of Correction*, 186 Conn. App. 107, 131, 198 A.3d 698 ("[m]ere conjecture and speculation are not enough to support a showing of prejudice" (internal quotation marks omitted)), cert. denied, 330 Conn. 955, 197 A.3d 893 (2018). Consistent with that principle is the basis on which our Supreme Court has rejected claims of ineffective assistance for counsel's failure to advance novel legal theories: The chances of success are purely speculative.[5] See *Ledbetter* v. *Commissioner of Correction*, supra, 275 Conn. 462. The novelty of challenging the bribery statute as facially overbroad is fatal to the petitioner's ability to establish prejudice, and we thus reject this claim of ineffective assistance of trial counsel.

B

The petitioner's claim as to appellate counsel is likewise without merit. As discussed previously, Billings, as appellate counsel, could not render ineffective assistance by failing to advance a novel constitutional claim. See id., 461. Because challenging the bribery statute as unconstitutionally overbroad was just as novel of a theory on appeal as it was at the petitioner's criminal trial, his claim of ineffective assistance as to Billings fails for the same reason.

Moreover, Billings testified during the habeas trial that he did not view the case as implicating the first amendment. See *Chicago* v. *Morales*, 527 U.S. 41, 52, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999) ("the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of [f]irst [a]mendment rights if the impermissible applications of the law are substantial when judged in relation to the statute's plainly legitimate sweep" (internal quotation marks omitted)). Instead, he believed that the case concerned how common people would view the statute as inapplicable, thus implicating its vagueness. See *United States* v. *Williams*, 553 U.S. 285, 304, 128 S. Ct. 1830, 170 L. Ed.

[5] We also are mindful that, in disposing of the petitioner's direct appeal, this court concluded that "a monetary offer, made with the intent of settling a civil dispute should not, and in fact does not fall within the ambit of § 53a-149." *State* v. *Davis*, supra, 160 Conn. App. 266 n.5. That conclusion undercuts any likelihood of success had Cashman made an overbreadth argument. See *Sanders* v. *Commissioner of Correction*, supra, 169 Conn. App. 834.

2d 650 (2008) ("Vagueness doctrine is an outgrowth not of the [f]irst [a]mendment, but of the [d]ue [p]rocess [c]lause of the [f]ifth [a]mendment. A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."). In its memorandum of decision, the court found that Billings "employed well reasoned and researched lines of argument" in making his vagueness challenge.

Consistent with that conclusion, we emphasize that Billings was not obligated to raise every conceivable claim in the petitioner's direct appeal. See *Camacho* v. *Commissioner of Correction*, supra, 148 Conn. App. 495. It is clear that Billings pursued the three claims he believed to be the strongest available on the basis of his review of the law and trial record. We will not question the tactical decision of appellate counsel with the benefit of hindsight. See *Smith* v. *Commissioner of Correction*, 148 Conn. App. 517, 532, 85 A.3d 1199, cert. denied, 312 Conn. 901, 91 A.3d 908 (2014). Thus, the petitioner's claim that appellate counsel rendered ineffective assistance for failing to challenge the bribery statute on overbreadth grounds fails by virtue of the argument's having been an untested novel legal theory. See *Ledbetter* v. *Commissioner of Correction*, supra, 275 Conn. 461. Because we agree with the court's conclusion that Billings was not deficient in his performance, we need not address the prejudice prong under *Strickland*. See *Breton* v. *Commissioner of Correction*, supra, 325 Conn. 669.

II

The petitioner next claims that both trial and appellate counsel provided ineffective assistance by failing to request at trial and to argue on direct appeal, respectively, that the trial court should have given the jury a "true threats" instruction with respect to the breach of the peace charge under § 53a-181 (a) (3).[6] He further asserts that, because his speech did not constitute a true threat,[7] it is reasonably probable that the result of his trial would have been different had an instruction been given or if the instructional issue had been argued on appeal. In response, the respondent, the Commissioner of Correction, points to procedural infirmities with respect to the petitioner's claim as to both trial and appellate counsel. He further argues that, even assuming the claim was properly preserved, any claim of ineffectiveness is meritless because both Cashman

[6] General Statutes § 53a-181 (a) provides in relevant part: "A person is guilty of breach of the peace in the second degree when, with the intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person . . . (3) threatens to commit any crime against another person or such other person's property . . . ."

Furthermore, the statute requires that, to obtain a conviction, a person must have "act[ed] with the requisite intent or recklessness." Commission to Revise the Criminal Statutes, Penal Code Comments, Conn. Gen. Stat. Ann. § 53a-181 (West 2012) comment, p. 396.

As our Supreme Court has held, "the predominant intent [required under § 53a-181 (a)] is to cause what a reasonable person operating under contemporary community standards would consider a disturbance to or impediment of lawful activity, a deep feeling of vexation or provocation, or a feeling of anxiety prompted by threatened danger or harm. In order to sustain a conviction for [breach of the peace], the state must begin by demonstrating that the defendant had such a state of mind." (Internal quotation marks omitted.) *State* v. *Wolff*, 237 Conn. 633, 670, 678 A.2d 1369 (1996).

[7] "True threats encompass those [unprotected] statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. . . . The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur. . . . Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." (Citations omitted; internal quotation marks omitted.) *Virginia* v. *Black*, 538 U.S. 343, 359–60, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003).

and Billings recognized that the breach of the peace charge was not based solely on the petitioner's speech. Accordingly, the respondent posits that both trial and appellate counsel reasonably concluded that no basis existed to request a first amendment instruction with respect to the breach of the peace charge.

Before addressing these respective arguments, we first note certain additional procedural facts that are relevant to the petitioner's claim. During the petitioner's criminal trial and outside the presence of the jury, both Cashman and the prosecutor clarified that the threatening charge concerned threats the petitioner made against Jarmoszko. They further agreed that the breach of the peace charge was premised on the theory that the petitioner threatened to commit an assault on Jarmoszko. Shortly thereafter, Cashman moved for a judgment of acquittal as to the threatening charge. Cashman argued that "the only evidence in the record that would conceivably constitute the threat [of an assault] was the statement, 'let's settle this like men.' . . . Those words alone clearly do not constitute a threat. And, more specifically, not only would there have to be a threat, but there would have to be the belief that there was imminent serious physical injury." The court agreed and found that no jury could reach a guilty verdict on the basis of the evidence. The court explained that the words, "why don't we settle this like men . . . are clearly not sufficient to constitute a physical threat. There was no action. . . . There's no evidence to support that [the petitioner] intended to place [Jarmoszko] in fear of serious physical injury." The court thereafter granted the petitioner's motion for a judgment of acquittal on the threatening charge.

Immediately thereafter, Cashman moved for a judgment of acquittal on the breach of the peace charge on the basis of the same reasoning. Cashman argued that, on the basis of the court's finding that the words, "let's settle [it] like men," were insufficient to constitute a threat, there was insufficient evidence to establish that the petitioner threatened to commit a crime against Jarmoszko under § 53a-181 (a) (3). In denying the motion, the court noted that, "unlike the threatening statute, [the breach of the peace] statute says [that] a person is guilty of breach of the peace when, with intent to cause inconvenience, annoyance or alarm, he threatens to commit any crime against another person. And [the] defense is quite correct, when, certainly, you can read the statement 'settle it like men' as an intent to engage in a fight, [and] therefore, commit the crime of assault." The court then denied the motion to dismiss the breach of the peace charge.

At the petitioner's habeas trial, Cashman testified that, in his judgment, the breach of the peace charge was not predicated solely on words but instead concerned the overall conduct of the petitioner. According to Cashman, the issue of "true threats" or "fighting words"[8] with respect to the breach of the peace charge was irrelevant because the charge itself encompassed conduct that went beyond words and, thus, did not implicate the first amendment. With respect to appellate counsel, Billings testified that he did not believe challenging the breach of the peace charge on appeal would

[8] As the United States Supreme Court has explained, "fighting words—those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction—are generally proscribable under the [f]irst [a]mendment." (Internal quotation marks omitted.) *Virginia* v. *Black*, 538 U.S. 343, 359, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003). In order to rise to the level of fighting words, the speech must have the tendency to cause "imminent acts of violence or an immediate breach of the peace." *State* v. *Szymkiewicz*, 237 Conn. 613, 620, 678 A.2d 473 (1996). Although fighting words and true threats are two related types of unprotected speech, the former concerns speech that has a direct tendency to evoke acts of violence while the latter encompasses speech that puts the listener in fear of violence. See *State* v. *Parnoff*, 329 Conn. 386, 409–10, 186 A.3d 640 (2018) (*Kahn, J.*, concurring in the judgment) (examining differences between true threats and fighting words exceptions to first amendment).

have been successful. He echoed the reasoning of Cashman, stating that the breach of the peace charge was not necessarily based on the petitioner's speech. Billings further testified that he believed that bringing such a claim on appeal would have taken away from the bribery claim, which he believed to be the strongest appellate claim. The petitioner's expert witness, Attorney Jeffrey C. Kestenband, testified that, in his opinion, Cashman violated the standard of care by failing to request a jury instruction on the meaning of true threats with respect to the breach of the peace charge.[9]

In its memorandum of decision, the habeas court found that, even if Cashman's performance was deficient for failing to request a jury instruction on true threats, the petitioner's language constituted "fighting words." In reaching that conclusion, the habeas court noted: (1) while Jarmoszko was stopped at a traffic signal, his vehicle was struck by the petitioner's vehicle; (2) after Jarmoszko rejected the petitioner's offer of $200 to forget about the incident, the petitioner—approximately six feet, two inches, tall and 230 pounds—became agitated, offering to fight Jarmoszko by saying, " '[w]hy don't we pull over to the side and settle it like men' "; (3) Jarmoszko believed that the petitioner wanted to fight him; (4) Jarmoszko became afraid that he might be assaulted and therefore returned to his vehicle to call the police; (5) the petitioner approached Jarmoszko's vehicle, banged on the window, and made unintelligible statements to Jarmoszko; and (6) Jarmoszko became concerned for his safety and called the police a second time.

[9] We note that when Kestenband was asked about Billings' performance on the issue, the respondent objected on the ground that the claim in the petition concerning Billings did not refer to anything about his failure to litigate jury instructions. The court agreed that the petition claimed only that Billings failed to challenge the breach of the peace statute on appeal as facially overbroad and then asked the petitioner's counsel to "move on from jury instructions."

With respect to appellate counsel, the court found Billings credible in his approach and diligent in bringing the petitioner's appeal. The court reiterated its finding that the petitioner had used " 'fighting words,' " which were the predicate for the breach of the peace charge. It further noted that attacking the six month sentence on the breach of the peace conviction would have been of little value. It highlighted the fact that the six month sentence on the conviction was concurrent with a one year sentence for interfering with the police.

A

We first address the petitioner's claim with respect to his trial counsel. On appeal, the petitioner argues that Cashman's failure to ask for a jury instruction on "true threats" for the breach of the peace charge constituted deficient performance and prejudiced him. Specifically, he contends that, in the absence of a judicial gloss rendering § 53a-181 (a) as applicable only to "true threats," the breach of the peace statute is unconstitutionally overbroad. The petitioner further asserts that, because the charge was predicated in substance on his speech, the jury should have been instructed on true threats as an element of the charge to narrow the scope of § 53a-181 (a) (3). He claims that, if such an instruction had been provided, it is reasonably likely that the verdict would have been different because the speech at issue did not constitute a true threat.

1

Before turning to the merits of that claim, we first address the respondent's argument that this claim is not properly before this court. The respondent argues that the petitioner failed to challenge the basis on which the habeas court rejected his claim, specifically, in finding that the petitioner's speech constituted fighting words. We disagree.

In its memorandum of decision, the habeas court reasoned that, even assuming that the first amendment was implicated and that trial counsel requested a true threats jury instruction with respect to the breach of the peace charge, the petitioner's speech amounted to fighting words. Thus, because fighting words are outside the protection of the first amendment and may be criminalized under the breach of the peace statute; see *State* v. *DeLoreto*, 265 Conn. 145, 168, 827 A.2d 671 (2003); we read the court's conclusion as resting on the petitioner's failure to establish prejudice under *Strickland*.

In his principal brief to this court, the petitioner explicitly challenges the habeas court's determination that he "was not prejudiced because his speech constituted fighting words under the circumstances" by arguing that such a determination ignored the state's theory as actually presented to the jury. Thus, we conclude that the petitioner's claim as to trial counsel is properly before this court.

2

Having determined that this claim is properly before us, we now address its merits. As discussed in footnote 4 of this opinion, the habeas court appears to have addressed this claim—along with two others—by disposing of it under the prejudice prong of *Strickland*. We further note that both parties read the court's decision as rejecting the claim on the basis of the petitioner's failure to prove prejudice. Nowhere in its memorandum of decision did the court make any factual findings with respect to the performance prong. Therefore, our analysis is confined to whether the court properly determined that the petitioner failed to prove prejudice. See *Small* v. *Commissioner of Correction*, supra, 286 Conn. 716 ("[w]hen the record on appeal is devoid of factual findings by the habeas court as to the performance of counsel, it is improper for an appellate court to make its own factual findings"). We conclude that the court properly did so.[10]

Our Supreme Court has explained that "unless a judicial gloss is placed on § 53a-181 (a) (3) requiring proof

[10] Our review of the record reveals yet another procedural wrinkle, albeit one that neither party has addressed. Specifically, the petition alleges that trial counsel rendered ineffective assistance "by failing to request a jury instruction or to take exception to the judge's charge as given, because the [petitioner's] speech, itself, could not constitute the basis for [the] breach of [the] peace [charge] unless it constituted *fighting words* . . . ." (Emphasis added.) In contrast, on appeal, the petitioner phrases this claim differently, alleging that trial counsel was "ineffective for failing to raise a claim of instructional error for the trial court's failure to instruct the jury on *true threats* for the breach of the peace charge." (Emphasis added.)

Despite this subtle distinction in how the claim was framed, both parties appear to believe that the petitioner's claim concerns a failure to instruct on both true threats and fighting words. For instance, Cashman was questioned by the petitioner's habeas counsel about his reasons for not bringing the issue of fighting words or true threats to the court's attention when challenging the breach of the peace charge. The respondent made no objection to that questioning. When Kestenband was questioned about his opinion as to Cashman's performance, he stated that Cashman "should've requested a jury instruction on the meaning of true threats because the claim here was that [the petitioner] committed a breach of [the] peace based on threatening conduct. And yet the [criminal court] never defined for the jury what the term, true threat, actually means . . . ." Moreover, in both his pretrial and posttrial brief, the petitioner framed the claim in the following manner: "Because the petitioner's comment did not constitute a 'true threat' or 'fighting words,' it remained protected speech and the jury should have been instructed about the difference between unprotected and protected speech." In his posttrial brief, the respondent provides only a general phrasing of the claim, as follows: "Cashman was ineffective because he did not seek a jury instruction that the petitioner's speech, itself, could not constitute the basis for a breach of [the] peace . . . ." (Internal quotation marks omitted.) Finally, the habeas court itself framed the petitioner's claim in a general manner: "Claim 9i. claims ineffective assistance of trial counsel for not taking exception to the court's instructions to the jury because the petitioner's speech itself could not constitute a breach of [the] peace."

Thus, the record indicates that both parties presumed that the petitioner's claim was predicated on a failure to request a jury instruction with respect to both a true threats instruction and a fighting words instruction for the breach of the peace charge. We, therefore, address the petitioner's claim on appeal in the form the petitioner and the respondent appear to have accepted.

that the allegedly threatening conduct at issue constituted a true threat, the statute would be overbroad because it could be applied to punish expressive conduct protected by the first amendment. . . . Furthermore, in accordance with the purpose underlying this judicial gloss, a defendant whose alleged threats form the basis of a prosecution under any provision of our Penal Code, including § 53a-181 (a) (3), is entitled to an instruction that he could be convicted as charged only if his statements . . . constituted a true threat, that is, a threat that would be viewed by a reasonable person as one that would be understood by the person against whom it was directed as a serious expression of an intent to harm or assault, and not as mere puffery, bluster, jest or hyperbole."[11] (Citation omitted; internal quotation marks omitted.) *State* v. *Moulton*, 310 Conn. 337, 367–68, 78 A.3d 55 (2013). Section 53a-181 (a) (3) has been construed to criminalize not only true threats but also fighting words. See *State* v. *DeLoreto*, supra, 265 Conn. 168. In addition, the Connecticut Judicial Branch Criminal Jury Instructions, both at present and at the time of the petitioner's criminal trial, included a true threats instruction within the "threat" element of § 53a-181 (a) (3). See Connecticut Judicial Branch Criminal Jury Instructions § 8.4-4 (Rev. to June 12, 2009), available at https://jud.ct.gov/JI/Criminal/Criminal.pdf (last visited June 11, 2020).[12]

[11] In its charge to the jury on the breach of the peace count, the trial court gave the following instruction with respect to the "threat" element: "Element two is a threat. And that requires that the [petitioner] threatened to commit a crime against another person or such other person's property. The predominant intent must be to cause what a reasonable person operating under contemporary circumstances would consider a disturbance to or impediment of a lawful activity, a deep feeling of vexation or provocation, or a feeling of anxiety prompted by threatened danger or harm. And, in this case, the threat that is alleged to have been made is to commit a crime against [Jarmoszko]. Once again, my instruction on intent applies to this count as well." There is no dispute that the court failed to provide an instruction on true threats in accordance with *DeLoreto*.

[12] The criminal jury instructions on the Judicial Branch website state that they are "intended as a guide for judges and attorneys in constructing charges

With these legal principles in mind, however, we reiterate that the prevailing question under *Strickland*'s prejudice prong "is whether there is a reasonable probability that, absent the errors, the [fact finder] would have had a reasonable doubt respecting guilt." (Internal quotation marks omitted.) *Skakel* v. *Commissioner of Correction*, supra, 329 Conn. 38. In other words, "[t]he petitioner bears the burden of establishing that it is reasonably probable that, had such an instruction been given, it is reasonably likely that the result of the trial would have been different." *Hickey* v. *Commissioner of Correction*, 329 Conn. 605, 619, 188 A.3d 715 (2018). We are not convinced that the petitioner has satisfied that burden.

To begin, we note that the first amendment is not implicated when a breach of the peace charge is predicated on conduct rather than speech. See *State* v. *Simmons*, 86 Conn. App. 381, 389, 861 A.2d 537 (2004), cert. denied, 273 Conn. 923, 871 A.2d 1033, cert. denied, 546 U.S. 822, 126 S. Ct. 356, 163 L. Ed. 2d 64 (2005). This remains so even when speech, although an aspect of the underlying charge, is merely a component of aggressive behavior. See id.; see also *State* v. *Bagnaschi*, 180 Conn. App. 835, 851–52, 184 A.3d 1234 (first amendment not implicated in prosecution of breach of peace charge when "defendant's conduct consisted of more than mere speech"), cert. denied, 329 Conn. 912, 186 A.3d 1170 (2018); cf. *State* v. *Lo Sacco*, 12 Conn. App. 481, 489, 531 A.2d 184 (evidence that defendant placed hands in victim's car window and leaned in to yell at her was

and requests to charge. The use of these instructions is entirely discretionary and their publication by the Judicial Branch is not a guarantee of their legal sufficiency." Connecticut Judicial Branch Criminal Jury Instructions, available at https://www.jud.ct.gov/JI/Criminal/Criminal.pdf; see also *State* v. *Reyes*, 325 Conn. 815, 822 n.3, 160 A.3d 323 (2017); *State* v. *Outlaw*, 179 Conn. App. 345, 356 n.9, 179 A.3d 219, cert. denied, 328 Conn. 910, 178 A.3d 1042 (2018). Accordingly, we recognize that such instructions do not have the force of law and refer to the Connecticut Judicial Branch Criminal Jury Instructions for informational purposes only.

conduct, not speech, that served as basis for charge of creating public disturbance in violation of General Statutes § 53a-181a, which is similar to breach of peace), cert. denied, 205 Conn. 814, 533 A.2d 568 (1987). Accordingly, "[t]his court has . . . declined to consider first amendment claims sounding in pure speech where a defendant's physical conduct was augmented by his or her speech." *State* v. *Taveras*, 183 Conn. App. 354, 368, 193 A.3d 561 (2018).

If, however, speech is the focus of the charge, our analysis of whether that speech constitutes a proscribable threat is informed by the attendant circumstances. "Indeed . . . rigid adherence to the literal meaning of a communication without regard to its reasonable connotations derived from its ambience would render [statutes proscribing true threats] powerless against the ingenuity of threateners who can instill in the victim's mind as clear an apprehension of impending injury by an implied menace as by a literal threat. . . . Thus, a determination of what a defendant actually said is just the beginning of a threats analysis. Even when words are threatening on their face, careful attention must be paid to the context in which those statements are made to determine if the words may be objectively perceived as threatening." (Citation omitted; internal quotation marks omitted.) *State* v. *Krijger*, 313 Conn. 434, 453, 97 A.3d 946 (2014); see also *State* v. *Cook*, 287 Conn. 237, 250, 947 A.2d 307 ("circumstances surrounding the alleged threat are critical to the determination of whether the threat is a true threat"), cert. denied, 555 U.S. 970, 129 S. Ct. 464, 172 L. Ed. 2d 328 (2008).

On our review of the record, we do not believe the first amendment is implicated in the present case "because the defendant's conduct did not consist purely of speech." *State* v. *Andriulaitis*, 169 Conn. App. 286, 299, 150 A.3d 720 (2016). That conclusion is well supported by the factual circumstances at issue here. In its memorandum of decision, the court made the following relevant findings: (1) the petitioner was belligerent and intoxicated; (2) after Jarmoszko rejected the $200 offer, the petitioner became visibly agitated and wanted to " 'settle it like men' "; (3) Jarmoszko feared that the petitioner, who was approximately six feet, two inches, tall and 230 pounds, wanted to " 'take a swing at me' " and subsequently returned to his vehicle to call the police; (4) the petitioner approached Jarmoszko's vehicle and began banging on the window while making unintelligible statements; and (5) Jarmoszko called the police a second time after becoming increasingly concerned for his safety due to the petitioner's behavior. Consistent with those findings, Jarmoszko testified at the petitioner's criminal trial that he made the second call to the police because "I was concerned for my safety. I didn't know what the [petitioner] was doing. And I wanted them to find out where they were. . . . Why aren't they here yet?"[13]

In our view, it was the petitioner's conduct, and not his speech, that constituted the alleged threat to commit an assault on Jarmoszko. Specifically, Jarmoszko testified that it was his fear of what " 'the [petitioner] was doing,' " not what the petitioner said, that caused him to contact the police a second time. See *State* v. *Andriulaitis*, supra, 169 Conn. App. 298 (fact that victim was instructed by police officer to retreat from entering home due to defendant's yelling and blocking entrance demonstrated that "defendant's demeanor was manifestly aggressive" and proscribable conduct). Although Jarmoszko stated that the petitioner became agitated

[13] The record further indicates that the state's theory of the case was predicated on the petitioner's conduct, not on his words. For instance, when arguing against a judgment of acquittal on the breach of the peace charge, the prosecutor emphasized that the state's theory was that the petitioner "threatened [Jarmoszko] by his actions . . . ." That threat, the prosecutor asserted, "[does not] have to amount to words. I think, under all the intended circumstances, that [the petitioner] was certainly threatening to assault [Jarmoszko], and that's how [Jarmoszko] took it."

and offered to " 'settle it like men' " in response to Jarmoszko's rejection of the $200 offer, the petitioner thereafter became physically aggressive by approaching Jarmoszko's car window and banging on it repeatedly while yelling unintelligibly. Cf. *State* v. *Krijger*, supra, 313 Conn. 456 (in holding that defendant did not make statements to victim with serious expression of intent to harm, court highlighted that defendant was angry but "not physically aggressive"); *State* v. *Taveras*, supra, 183 Conn. App. 369–70 (rejecting claim that sufficient evidence existed to find defendant committed breach of peace based on nonverbal conduct after noting absence of evidence defendant made any threatening gestures in conjunction with statement). In fact, this court has previously held that physically touching a car window to yell at a victim constitutes conduct that does not implicate the first amendment for purposes of a charge of creating public disturbance in violation of § 53a-181a, which is similar to breach of the peace. See *State* v. *Lo Sacco*, supra, 12 Conn. App. 489 (evidence that defendant approached victim's car intoxicated, placed his hands on window, leaned into car, and proceeded to yell at her indicates that conduct, not speech, was basis for conviction and does not implicate first amendment).

We are mindful that the petitioner's statement, " '[w]hy don't we . . . settle it like men,' " was a component of the course of conduct at issue in the underlying criminal case. See *State* v. *Davis*, supra, 160 Conn. App. 255. Although the petitioner argues that this statement was the basis for the breach of the peace charge, the record does not provide support for that assertion. In light of our determination, we again emphasize that it was the petitioner's burden to establish that, had the trial court provided a true threats instruction, it is reasonably likely that the jury's guilty verdict on the breach of the peace charge would have been different. See *Hickey* v. *Commissioner of Correction*, supra, 329 Conn. 619–20.

Because the petitioner's conduct was the predicate for the alleged threat made to Jarmoszko, the first amendment was not implicated, and, as a result, there was no need for a true threats instruction. Therefore, the petitioner has failed to establish the requisite prejudice, and, thus, he cannot succeed on his claim of ineffective assistance.[14]

B

We now turn to the petitioner's claims against his appellate counsel. The petitioner claims that Billings

[14] In reaching this conclusion, we acknowledge that the habeas court rejected the petitioner's claim for lack of prejudice on the ground that his statement, " 'why don't we . . . settle it like men,' " constituted fighting words. For the reasons already discussed, we do not agree that the first amendment was implicated, and, thus, disagree with that conclusion. Nevertheless, "[i]t is axiomatic that [w]e may affirm a proper result of the trial court for a different reason." (Internal quotation marks omitted.) *Diaz* v. *Commissioner of Correction*, 125 Conn. App. 57, 63 n.6, 6 A.3d 213 (2010), cert. denied, 299 Conn. 926, 11 A.3d 150 (2011).

Even if we were to assume that the first amendment was implicated, our review of the record strongly supports a determination that this statement—in light of the circumstances in which it was made—constituted a true threat, not fighting words. Compare *State* v. *Parnoff*, 329 Conn. 386, 394, 186 A.3d 640 (2018) ("[t]o qualify as unprotected fighting words, the speech must be likely to provoke an *imminent* violent response from the [addressee]" (emphasis in original; internal quotation marks omitted)), to *State* v. *Moulton*, supra, 310 Conn. 349 ("[t]rue threats encompass those statements [in which] the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals" (internal quotation marks omitted)). The evidence adduced at the criminal trial and the findings made by the habeas court suggest that the statement was intended to engender fear in Jarmoszko of unlawful violence, not to provoke an imminent violent *response*. Jarmoszko specifically testified to that fear during the criminal trial. Jarmoszko was, in fact, in fear of his physical safety as a result of the petitioner's statement and his subsequent conduct, prompting him to twice contact the police. See *State* v. *DeLoreto*, supra, 265 Conn. 156–58 (considering reaction of reasonable person when evaluating statement as true threat). We further note that the petitioner not only became physical with the responding police officers when they attempted to take him into custody but also attempted to spit on the officers and ambulance personnel and was physically restrained when being transported to the hospital. These circumstances shed light on the fact that the petitioner's statement to Jarmoszko was a rendered ineffective assistance because, given the trial court's ruling that the petitioner's speech did not constitute a threat, it is reasonably probable that this court would have concluded that the instructional error was not harmless beyond a reasonable doubt. The petitioner rests his claim on two interrelated arguments. First, he argues that the breach of the peace charge was predicated on the allegation that the petitioner's speech constituted a true threat toward Jarmoszko. Second, because the trial court determined that the petitioner's speech was insufficient for the threatening charge, there is a reasonable probability that this court would have concluded that such speech was not a "true threat" for purposes of the breach of the peace charge. The respondent, however, argues that this claim is unpreserved because it was not raised in the operative petition. The respondent notes that the only claim of ineffective assistance of appellate counsel that relates to the breach of the peace charge concerns counsel's failure to challenge the breach of the peace statute as facially overbroad and vague as applied. The respondent further asserts that, even ignoring the preservation issue, the basis of the breach of the peace charge was not limited solely to speech but, rather, to the petitioner's overall conduct. Thus, according to the respondent, Billings was well within the bounds of reasonable professional judgment when he concluded that there was no basis to raise that argument on appeal. We agree with the respondent that this claim is not properly before us and, therefore, do not reach its merits.

The respondent correctly notes that the petitioner's only claim of ineffective assistance of appellate counsel concerning the breach of the peace charge was Billings'

serious expression of an intent to cause him harm and to place him in fear of such harm. Cf. *State* v. *Krijger*, supra, 313 Conn. 456–58 (in analyzing whether statement was true threat, noting that defendant was not physically aggressive after making statement and subsequently apologetic to victim).

failure to challenge the statute as facially overbroad and unconstitutionally vague as applied. In his reply brief to this court, the petitioner responds that, pursuant to *DeLoreto*, the breach of the peace statute is unconstitutionally overbroad in the absence of a judicial gloss limiting its application to true threats. According to the petitioner, because the breach of the peace statute could be overbroad in the absence of a judicial gloss, a claim challenging the statute as overbroad is equivalent to a claim of instructional error.[15] Thus, the petitioner argues that the claims of ineffective assistance for failure to raise instructional error on appeal and failure to challenge the statute as facially overbroad are "two sides of the same coin."

"It is well settled that [t]he petition for a writ of habeas corpus is essentially a pleading and, as such, it should conform generally to a complaint in a civil action. . . . It is fundamental in our law that the right of [the petitioner] to recover is limited to the allegations of his complaint. . . . While the habeas court has considerable discretion to frame a remedy that is commensurate with the scope of the established constitutional violations . . . it does not have the discretion to look beyond the pleadings and trial evidence to decide claims not raised. . . . [T]he [petition] must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties." (Internal quotation marks omitted.) *Newland* v. *Commissioner of Correction*, 322 Conn. 664, 678, 142 A.3d

[15] In his principal brief to this court, the petitioner asks that we review his claim under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), should we conclude that it is unpreserved. In his reply brief to this court, however, the petitioner acknowledges that *Golding* is inapplicable and therefore no longer seeks review under *Golding*. See *Moye* v. *Commissioner of Correction*, 316 Conn. 779, 787, 114 A.3d 925 (2015) ("*Golding* review is available in a habeas appeal only for claims that challenge the actions of the habeas court" and is not available for unpreserved claims of ineffective assistance arising out of petitioner's criminal trial).

1095 (2016). "Our reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension." (Internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 536, 51 A.3d 367 (2012).

We are further cognizant that one claim—despite not having been explicitly raised in a petition for a writ of habeas corpus—can be so interrelated with another that distinguishing between the two is meaningless. See *Johnson* v. *Commissioner of Correction*, 330 Conn. 520, 541, 198 A.3d 52 (2019). Indeed, a claim may be so inextricably linked to another that deciding one necessarily requires a resolution of both. See id., 540–42.

In *Johnson*, our Supreme Court determined that the petitioner distinctly raised a claim of ineffective assistance for his counsel's inadequate investigation of alibi witnesses despite the absence of such language in his petition. Id., 540–41. In reaching that conclusion, the court acknowledged that the petition phrased the claim at issue as counsel's failure to prepare and present the testimony of two witnesses relevant to the alibi defense. Id., 540. Despite this difference in framing, the court emphasized that the subject matter of defense counsel's investigation into the alibi defense was extensively litigated during the habeas trial. Id., 541. Specifically, it highlighted that both parties questioned defense counsel about the investigative efforts into the alibi defense and framed the issue in their posttrial briefs as defense counsel's failure to investigate the alibi witnesses to present such a defense. It further noted that "[t]he respondent never objected to the petitioner's argument that his claim of failure to present the alibi defense was premised on defense counsel's failure to adequately investigate the defense." Id. In evaluating the alleged differences between the two claims, the court saw "no meaningful distinction between the phrases 'failure to prepare and present' and 'failure to investigate and present' that renders the investigation portion of this claim unpreserved. 'Preparation' necessarily includes 'investigation.' " Id. Not only did the court believe that the two claims were "inextricably linked," but it further highlighted the fact that the habeas court understood that one claim necessarily included the other. Id., 542.

Under the present circumstances, however, the petitioner's claim as to appellate counsel was not distinctly raised, nor is it inextricably linked to the claim alleged in the petition. In reaching that determination, we acknowledge *DeLoreto*'s holding that, in the absence of a judicial gloss interpreting § 53a-181 (a) as applying only to true threats, the statute could be construed as unconstitutionally overbroad. *State* v. *DeLoreto*, supra, 265 Conn. 166–67. Nevertheless, we do not believe that the record supports the petitioner's position that his claim of a failure to challenge jury instructions was properly raised by virtue of his claim of a failure to challenge § 53a-181 (a) as overbroad. Our conclusion rests on a number of reasons.

To begin, there is no dispute that the underlying petition does not assert a claim that appellate counsel rendered ineffective performance for failing to challenge the trial court's jury instructions on the breach of the peace charge. Rather, the only claims asserted against appellate counsel concerning that charge revolve around Billings' failure to challenge § 53a-181 (a) as facially overbroad and vague as applied. Our courts have consistently held that a claim challenging a jury instruction is preserved only if (1) a written request to charge covering the specific matter was submitted to the court or (2) a party takes exception to the charge as given. See, e.g., *State* v. *King*, 289 Conn. 496, 505, 958 A.2d 731 (2008). To properly do so, a challenge to or request for an instruction must do more than broadly refer to the subject matter at issue. See *State* v. *Salmond*, 179 Conn. App. 605, 625–26, 180 A.3d 979 ("[i]t does not follow . . . that a request to charge addressed to the subject matter generally, but which omits an instruction on a specific component, preserves a claim that the trial court's instruction regarding that component was defective" (internal quotation marks omitted)), cert. denied, 328 Conn. 936, 183 A.3d 1175 (2018); see also Practice Book § 42-16 (party challenging court's instruction "shall state distinctly the matter objected to and the ground of exception"). With these requirements in mind, we believe that the petition's claim as to the ineffective assistance of counsel does not encompass appellate counsel's failure to challenge the jury instructions. Nothing in the petition relates to litigating a jury instruction on true threats, nor does it consider whether the claim was properly preserved at the criminal trial for purposes of appeal. To put it simply, the petition is completely silent on anything that reasonably could be construed as relating to an issue of litigating a true threats jury instruction in the petitioner's direct appeal.

Instead, a fair reading of the operative petition indicates that the petitioner alleged against trial counsel only the failure to raise the jury instructional issue. Unlike its allegations concerning appellate counsel, the petition alleges distinct ineffective assistance claims against trial counsel for his failure to challenge § 53a-181 (a) as unconstitutionally overbroad and his failure to request a "fighting words" jury instruction. See footnote 10 of this opinion. That this distinction was made as to trial counsel, and not as to appellate counsel, undermines the petitioner's argument that the two claims are essentially the same.

Moreover, the record reflects that the circumstances in the present case are readily distinguishable from those that were highlighted by the court in *Johnson*. Neither party here explicitly or extensively questioned

Billings during the habeas trial about his failure to raise the issue of jury instructions on appeal.[16] Cf. *Johnson* v. *Commissioner of Correction*, supra, 330 Conn. 541. In addition, the respondent objected—for the same reason he asserts in this appeal—when Kestenband was questioned about his opinion regarding Billings' failure to raise the jury instruction issue on appeal. Cf. id. The habeas court sustained the objection and instructed the parties to "move on from jury instructions." Moreover, the petitioner did not frame his claim in his posttrial brief as appellate counsel's failure to challenge the jury instruction but, instead, maintained that his claim concerned a failure to challenge § 53a-181 (a) as unconstitutionally overbroad and vague. See id. Thus, it is of no surprise that the habeas court's memorandum of decision fails to address the jury instruction issue as to Billings, and it clearly did not consider the two claims to be inextricably linked. Cf. id., 542.

We acknowledge that a failure to apply a judicial gloss to the breach of the peace statute may render that statute unconstitutional if the charge is predicated on speech. See *State* v. *DeLoreto*, supra, 265 Conn. 166–67. We also note, however, that attacking the statute on overbreadth grounds is entirely distinct from attacking the breach of the peace charge on the basis of instructional error. Although the two certainly are related in this case, they are not intertwined to an extent that one claim necessarily relies on the resolution of the other. See *Johnson* v. *Commissioner of Correction*, supra, 330 Conn. 541–42.

In sum, the petition does not state a claim that appellate counsel was ineffective for failing to raise on appeal

[16] The only testimony elicited from Billings on the jury instructions issue was whether Cashman's failure to object to the instructions given at trial had any effect on Billings' decision to raise that issue on appeal in light of the requirements set forth under *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011).

the trial court's failure to instruct the jury regarding true threats for the breach of the peace charge. As discussed, that claim is not inextricably linked to the claim that was asserted in the habeas petition—that Billings rendered ineffective assistance for his failure to challenge § 53a-181 (a) as facially overbroad and vague as applied. Accordingly, the petitioner's claim of ineffective assistance as to Billings' failure to raise a claim of instructional error on direct appeal is not properly before this court. We thus decline to review the merits of that claim.[17]

III

The petitioner's final claim of ineffective assistance concerns the failure of both trial and appellate counsel

[17] Even if we were to reach a contrary conclusion, the record provides overwhelming support for the habeas court's determination that Billings did not render deficient performance when acting as the petitioner's appellate counsel. In its memorandum of decision, the court found that Billings had "testified credibly as to his approach to, and diligence in, the petitioner's appeal. He eschewed attacking the breach of [the] peace conviction and concentrated on the two felony convictions. . . . And [because the breach of the peace conviction's] six month sentence was concurrent to the other three sentences, prevailing on such a claim would have been of little value. This is especially true because it was concurrent to a one year sentence for interfering with police . . . that has gone completely unchallenged." During the habeas trial, Billings extensively testified to his reasons for choosing which claims to raise in the direct appeal. Billings stated that he did not believe challenging the breach of the peace charge would have been successful. He further explained that in deciding which claims to raise, his approach was to bring those claims that would afford practical relief, specifically, shortening the petitioner's sentence. As Billings stated, "I am not going to raise every conceivable issue in every case. Strategically, it takes away from the other issues."

This court has repeatedly held that appellate counsel "is not under an obligation to raise every conceivable issue." (Internal quotation marks omitted.) *Smith* v. *Commissioner of Correction*, supra, 148 Conn. App. 531. The record is replete with tactical justifications made by Billings that the habeas court expressly credited. See, e.g., *Bush* v. *Commissioner of Correction*, 169 Conn. App. 540, 550, 151 A.3d 388 (2016) ("the tactical decision of appellate counsel not to raise a particular claim is ordinarily a matter of appellate tactics, and not evidence of incompetency, in light of the presumption of reasonable professional judgment" (internal quotation marks omitted)), cert. denied, 324 Conn. 920, 157 A.3d 85 (2017). We believe those justifications are well-founded.

to challenge the admission of the petitioner's blood test results into evidence. According to the petitioner, because the manner in which his blood was taken allegedly did not satisfy the requirements of § 14-227a (k),[18] his trial counsel should have pursued a motion to suppress the results. The petitioner similarly argues that, because the issue of admissibility was preserved, appellate counsel rendered ineffective assistance by failing to raise that issue on appeal. We disagree.

The following additional undisputed facts are relevant to this claim. After the petitioner was discharged from the hospital following the November 20, 2010 incident, his medical records—including the results of the blood tests that were done during his stay—were obtained pursuant to a search warrant by the Manchester Police Department.[19] At the petitioner's criminal

[18] General Statutes § 14-227a (k) provides in relevant part: "[E]vidence respecting the amount of alcohol or drug in the blood or urine of an operator of a motor vehicle involved in an accident who has suffered or allegedly suffered physical injury in such accident, which evidence is derived from a chemical analysis of a blood sample taken from or a urine sample provided by such person after such accident at the scene of the accident, while en route to a hospital or at a hospital, shall be competent evidence to establish probable cause for the arrest by warrant of such person for violation of subsection (a) of this section and shall be admissible and competent in any subsequent prosecution thereof if: (1) The blood sample was taken or the urine sample was provided for the diagnosis and treatment of such injury; (2) if a blood sample was taken, the blood sample was taken in accordance with the regulations adopted under subsection (d) of this section; (3) a police officer has demonstrated to the satisfaction of a judge of the Superior Court that such officer has reason to believe that such person was operating a motor vehicle while under the influence of intoxicating liquor or drug or both and that the chemical analysis of such blood or urine sample constitutes evidence of the commission of the offense of operating a motor vehicle while under the influence of intoxicating liquor or drug or both in violation of subsection (a) of this section; and (4) such judge has issued a search warrant in accordance with section 54-33a authorizing the seizure of the chemical analysis of such blood or urine sample. Such search warrant may also authorize the seizure of the medical records prepared by the hospital in connection with the diagnosis or treatment of such injury."

[19] The parties do not dispute that the petitioner's medical records were obtained from the hospital pursuant to a valid search warrant.

trial, Cashman sought to have the petitioner's blood test results precluded from being admitted into evidence. In doing so, Cashman argued to the court that the admissibility of any blood test results of the petitioner was governed exclusively by § 14-227a in a prosecution for operation of a motor vehicle while under the influence of intoxicating liquor or drugs. Cashman noted that, under the requirements of § 14-227a (k), the results of a test on a blood sample can be admitted only if the sample was taken for the purpose of diagnosis or treatment of a physical injury that resulted from a motor vehicle accident. Cashman argued that, because there was no evidence that the blood sample was taken for the purpose of treating an injury, the blood test results were therefore inadmissible. The court agreed that § 14-227a (k) requires that, for the results of a test on a blood sample to be admissible, the blood sample must have been taken because the operator of the motor vehicle sustained physical injury during a motor vehicle accident. It disagreed, however, that § 14-227a is the exclusive method to have such evidence admitted. Rather, it concluded that there was nothing to prohibit the state "from seeking to utilize common-law rules of evidence in order to have such [blood sample] report introduced into evidence." The court also emphasized that, although it was not ruling that the blood test results were admissible at that point, it did not agree with Cashman's argument that § 14-227a was the only procedural vehicle for the admission of the results into evidence.[20]

During the habeas trial, Cashman testified that, although previous counsel had filed a motion to suppress the blood test results on constitutional grounds, he believed that the best chance for success was to

[20] The court agreed with Cashman that there was no evidence yet presented that the petitioner was physically injured as a result of the motor vehicle accident with Jarmoszko.

challenge their admission for failure to comply with § 14-227a (k). In defending against the charge brought under § 14-227a (a), Cashman believed there was a "very good opportunity to keep out the blood evidence" by arguing that the state did not satisfy the requirements under subsection (k) of that statute. Cashman further stated that, on the basis of his review of the medical records and the police report, the best chance for preventing the admission of the blood test results was to avoid the constitutional issues and to seek preclusion on statutory grounds.

Billings also provided testimony at the habeas trial concerning his reasons for not challenging the admission of the blood test results. In his view, the results were admitted under common-law rules of evidence, not under § 14-227a (k). In preparing the petitioner's direct appeal, he did not believe that the fourth amendment[21] was implicated on the basis of the case law governing such claims related to an unlawful seizure of blood. Additionally, Billings highlighted the lack of a suppression hearing at the trial level, which would have provided factual findings, thereby making a fourth amendment claim difficult. On the basis of his review of the record, Billings did not believe that he could make a strong fourth amendment claim on appeal.

In its memorandum of decision, the habeas court agreed with counsel's reasoning. It found that Cashman properly lodged an objection to the admission of the blood test results under § 14-227a, which was not sustained. The court rejected Kestenband's testimony that a motion to suppress should have been pursued because the blood sample was taken in violation of the fourth amendment. It further credited certain testimony given

[21] "The fourth amendment to the United States constitution, made applicable to the states through the [due process clause of the] fourteenth amendment, prohibits unreasonable searches and seizures by government agents." (Internal quotation marks omitted.) *State* v. *Jones*, 320 Conn. 22, 64, 128 A.3d 431 (2015).

by Andrew Hedberg, the responding emergency medical technician, and Magrey at the petitioner's criminal trial. Specifically, the court highlighted the fact that Hedberg "found the petitioner standing in a boat, soaking wet, loud and combative with [the] police. Subsequently, he smelled a strong odor of alcohol on the petitioner's breath, stable vitals but elevated blood pressure, and spitting. He was told by [the] police to transport the petitioner and placed a mask over his spitting mouth." The court also emphasized that Hedberg "did not testify that he saw no reason to transport." The court also credited Magrey's testimony that, although he was unsure whether the petitioner was in a " 'medical condition'," his skin was cold, soaking wet, and had turned either blue or purple. Magrey further stated that the petitioner was at first unresponsive and became "unrestrained emotionally" as he struggled with police officers and ambulance personnel. Magrey also testified that he was aware that the petitioner had fallen into the Connecticut River earlier that day. According to the court, with respect to the transport of the petitioner to the hospital, "[f]or the police to have done otherwise would have been a dereliction of their duties." (Internal quotation marks omitted.)

In reaching that conclusion, the court found that the petitioner's blood was not drawn at the request of the police. It noted that, according to the medical record, the petitioner was assessed as "intoxicated, agitated, and cold, some history was obtained from the petitioner's wife, including a recent occurrence of falling. After sedation with Haldol and Activan, the petitioner was placed in a 'monitored' bed until he could be psychiatrically assessed. The petitioner was transferred to a regular bed and not discharged until 1:38 p.m. the next day after receiving another Haldol injection and a saline IV." Thus, the court concluded that "[n]o evidence is contained in the [medical records] exhibit or elsewhere that the police requested a blood test, but a great deal of evidence exists that one was medically necessary due to the petitioner's physical and emotional condition requiring sedation." For the same reasons, the court concluded that Billings did not render ineffective assistance for failing to challenge the admission of the results on appeal. It further concluded that the petitioner "failed to call [Hedberg] or any of the hospital medical staff to counter the strong evidence of medical necessity," thereby failing to establish prejudice.

A

We find no merit to the petitioner's claim that trial counsel rendered ineffective assistance for his failure "to pursue a motion to suppress the results of the petitioner's blood test on the grounds that the state failed to satisfy its burden under [§ 14-227a (k)] . . . ." As the petitioner readily admits, Cashman pressed the court to preclude the blood test results from evidence on the ground that the state failed to satisfy the requirements of § 14-227a (k). Yet, according to the petitioner, Cashman failed to *adequately* argue that the state did not satisfy its burden of establishing that the blood sample was taken for the purpose of treating an injury sustained from the motor vehicle accident.

The petitioner's position is readily contradicted by the record. In fact, Cashman purposefully argued to the trial court that § 14-227a (k) was the governing method by which such results could be admitted into evidence. In making that argument, Cashman asserted that the state "needs to satisfy the conditions precedent that the statute contemplates in order to successfully admit the results of a blood sample in a prosecution for operating under the influence." The court agreed with Cashman that, under § 14-227a (k), the state would need to show that the petitioner's injuries must have been both physical and a direct result of the motor vehicle accident. Although it acknowledged the absence of any evidence suggesting the petitioner's injuries were sustained in the accident itself, the court rejected Cashman's argument that § 14-227a was the exclusive method for admitting blood test results. The petitioner may believe that Cashman did not adequately argue his position and should have continued to press the court to reconsider. Cashman's unsuccessful attempt to convince the trial court, however, does not constitute deficient performance.[22]

B

We now turn to the petitioner's claims against his appellate counsel. We agree with the habeas court's conclusion that Billings was not deficient for failing to

[22] To the extent that the petitioner argues that Cashman rendered ineffective assistance for failing to challenge the admission of the blood test results as a business record, we determine that such a claim is unpreserved. The relevant claim as stated in the operative habeas petition asserts that Cashman rendered ineffective assistance by failing to pursue a motion to suppress the petitioner's blood test results under the fourth amendment to the United States constitution and article first, §§ 7 or 9, or both, of the Connecticut constitution. Absent from the petition is any reference to Cashman's failure to object to the blood test results being admitted under the business record exception to the rule against hearsay. See *State* v. *Kirsch*, 263 Conn. 390, 400, 820 A.2d 236 (2003) ("[General Statutes §] 52-180 sets forth an exception to the evidentiary rule otherwise barring admission of hearsay evidence for business records that satisfy express criteria"); *Jeffrey* v. *Commissioner of Correction*, 36 Conn. App. 216, 220–23, 650 A.2d 602 (1994) (trial counsel's failure to object to admission of sex crimes report on hearsay grounds did not prejudice petitioner when portions of police report could have been admitted as business record). Moreover, the record before the habeas court indicates that the petitioner's hospital records were accompanied by a medical records certificate and thus would have been admissible under General Statutes § 4-104. Because the petitioner raises a claim that was not before the habeas court, the respondent had no opportunity to question Cashman as to whether the existence of the self-authentication certificate made an objection that was based on the business records exception meritless.

"For this court to . . . consider a claim on the basis of a specific legal ground not raised during trial would amount to trial by ambuscade, unfair both to the [court] and to the opposing party." (Internal quotation marks omitted.) *Crawford* v. *Commissioner of Correction*, 294 Conn. 165, 177, 982 A.2d 620 (2009). Thus, we decline to review it on appeal. See *Eubanks* v. *Commissioner of Correction*, 329 Conn. 584, 597–98, 188 A.3d 702 (2018).

challenge the blood test results under the same legal theory argued by Cashman. The petitioner contends that Billings should have claimed that § 14-227a (k) was the exclusive procedural vehicle for admitting the results into evidence and that the state had failed to satisfy the requirements of that statute. He further appears to claim ineffective assistance by Billings for his failure to challenge the evidence on fourth amendment grounds. We disagree.

The habeas court's conclusion rejecting this claim finds ample support in the record. In his testimony during the habeas trial, Billings cited a number of reasons for his decision not to challenge the admission of the blood test results into evidence. One of the reasons consisted of his disagreement with Cashman that § 14-227a (k) controlled the admission of the results. In elaborating on that disagreement, Billings cited to *Kirsch* for the proposition that the state's failure to satisfy the statute's requirements does not foreclose it from introducing blood test results into evidence by different means. Additionally, Billings did not believe that challenging the blood test results on fourth amendment grounds would have proven successful because, on the basis of his review of the record, a hospital may draw blood for the purpose of treatment. In his view, the factual circumstances of the petitioner's case—in the absence of any additional underlying facts about the hospital's decision to take the petitioner's blood sample—made the chances for a fourth amendment claim difficult in light of existing legal precedent.

The relevant case law provides ample support for those concerns. Indeed, our courts have held that the state's failure to satisfy all of the requirements under § 14-227a "does not . . . proscribe the admission of evidence that fails to satisfy [its requirements]." *State* v. *Kirsch*, supra, 263 Conn. 408; see *State* v. *Szepanski*, 57 Conn. App. 484, 490, 749 A.2d 653 (2000) (predecessor to § 14-227a (k) "is permissive, not restrictive," and therefore blood alcohol content taken from blood sample is not inadmissible simply because it fails to satisfy all of statute's requirements). The argument that § 14-227a controls the admission of blood test results in a charge brought under that statute was, at best, weak. Accordingly, Billings' failure to raise it on appeal did not constitute deficient performance. See *Camacho* v. *Commissioner of Correction*, supra, 148 Conn. App. 495.

Moreover, existing case law at the time of the petitioner's direct appeal supports Billings' belief that the facts underlying the blood draw by the hospital rendered it constitutionally permissible. As reaffirmed by the United States Supreme Court in *Missouri* v. *McNeely*, 569 U.S. 141, 148–49, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013), the fourth amendment requires that a law enforcement officer must obtain a valid search warrant when seeking to take a blood sample from a defendant without his or her consent.[23] Where exigent circumstances exist, however, a search warrant is not required to satisfy the fourth amendment. Id. 148–49. The court has also held that, although hospital employees "may have a duty to provide the police with evidence

[23] In *McNeely*, the court rejected the state's proposed per se rule that blood testing in drunken driving cases constitutes an exigency for purposes of the fourth amendment. *Missouri* v. *McNeely*, supra, 569 U.S. 152–56. In reaching that determination, the court maintained that "a compelled physical intrusion beneath [a defendant's] skin and into his [or her] veins to obtain a sample of his [or her] blood for use as evidence in a criminal investigation" constitutes a search under the fourth amendment. Id., 148. Accordingly, a law enforcement officer is permitted to invade another person's body only after obtaining a warrant to do so. Id. The court, however, noted that the warrant requirement "is subject to exceptions. One well-recognized exception, and the one at issue in this case, applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the [f]ourth [a]mendment." (Internal quotation marks omitted.) Id., 148–49. The court further noted that because the state had not argued that there were exigent circumstances other than the per se rule it sought to have applied, the court could not determine whether such circumstances existed. Id., 165.

of criminal conduct that they inadvertently acquire in the course of routine treatment, when they undertake to obtain such evidence from their patients *for the specific purpose of incriminating those patients*, they have a special obligation to make sure that the patients are fully informed about their constitutional rights, as standards of knowing waiver require." (Emphasis in original.) *Ferguson* v. *Charleston*, 532 U.S. 67, 84–85, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001). We further note that the fourth amendment is not implicated when the police do not take a petitioner's blood sample or ask that it be drawn. See *State* v. *Petruzzelli*, 45 Conn. App. 804, 807, 699 A.2d 204 (1997), citing *Skinner* v. *Railway Labor Executives' Assn.*, 489 U.S. 602, 614, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989).

In the present case, the habeas court found that the petitioner's general state of well-being was a primary concern of Magrey after he noticed that the petitioner was soaking wet and that the petitioner's skin had turned to either a blue or purple color. Magrey was unsure whether the petitioner was in a " 'medical condition' " but was clearly concerned that the petitioner was initially unresponsive and, knowing that the petitioner had fallen into the Connecticut River earlier that day, appeared to be heavily intoxicated. The court also found that the police officers told Hedberg to transport the petitioner to the hospital. There was no evidence, however, that this request was a pretext for having the petitioner's blood drawn by the hospital for the purpose of gathering inculpatory evidence.[24] See *State* v. *Petruzzelli*, supra, 45 Conn. App. 808 n.3. These findings, which are supported by the record, substantiate the primary reasons why Billings decided against challenging the admission of the blood test results on appeal.

[24] As the habeas court correctly noted, "Hedberg did not testify that he saw no reason to transport [the petitioner to the hospital]."

We further agree with the court's conclusion that the petitioner failed to establish prejudice in light of the absence of any evidence proffered during the habeas trial that there was a reasonable likelihood of this claim succeeding on appeal. As indicated before, there is little to suggest that the petitioner's transfer to and treatment by the hospital was a pretext for gathering evidence to be used against him, nor is there evidence to indicate that the police requested the hospital to draw the petitioner's blood. See *Skinner* v. *Railway Labor Executives' Assn.*, supra, 489 U.S. 621 n.5 (no indication or argument that railroad regulations mandating toxicology tests of employee involved in accident "[were] designed as a pretext to enable law enforcement authorities to gather evidence of penal law violations" (internal quotation marks omitted)); *State* v. *Petruzzelli*, supra, 45 Conn. App. 807 (fourth amendment not implicated when police neither took blood sample nor requested hospital to draw blood sample from defendant). Instead, there is a vast amount of evidence suggesting that Magrey's request for the petitioner to be taken to the hospital was based on a genuine concern for his health.[25]

In light of that conclusion, it follows that the petitioner's claim of ineffective assistance of appellate counsel must fail. Billings' decision not to challenge the admission of the blood test results was sound appellate strategy that was based on his reasons for avoiding that issue. See *Salters* v. *Commissioner of Correction*, 175 Conn. App. 807, 831, 170 A.3d 25 (evidence supported habeas court's conclusion that appellate counsel "made a reasonable strategic decision in choosing to forgo a meritless or weak claim of prosecutorial impropriety"), cert. denied, 327 Conn. 969, 173 A.3d 954 (2017). The petitioner further has failed to prove that he suffered

[25] Also absent from the record is any evidence suggesting that the hospital did not take the blood sample for the purpose of treating the petitioner.

any prejudice as a result of appellate counsel's failure to raise that issue on appeal. See *Small* v. *Commissioner of Correction*, supra, 286 Conn. 728–29. Accordingly, the court properly denied the petition for a writ of habeas corpus.

The judgment is affirmed.

In this opinion the other judges concurred.

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NOTICE

Public Hearing on Practice Book Revisions to the Rules of Appellate Procedure Being Considered by the Justices of the Supreme Court and Judges of the Appellate Court

On June 29, 2020, at 10 a.m., a public hearing will be conducted pursuant to General Statutes § 51-14 (c) for the purpose of receiving comments concerning revisions to the Rules of Appellate Procedure, which are being considered by the Justices and Judges, as well as any proposed new rule or any change to an existing rule that any member of the public deems desirable. The revisions proposed by the Advisory Committee on Appellate Rules were printed in the June 9, 2020 issue of the Connecticut Law Journal and are posted on the Judicial Branch website at http://www.jud.ct.gov/pb.htm.

Because of the public health emergency and civil preparedness emergency declared by Governor Lamont on March 10, 2020, the public hearing will be conducted electronically using *Microsoft Teams* communication and collaboration platform. Individuals who would like to access the public hearing may do so by clicking here.

For every individual who wishes to access the public hearing, and for those who wish to speak at the public hearing, it is important that certain procedures be followed. All individuals who access the public hearing must at all times act in a professional and respectful manner. Any individual whose conduct is deemed by the co-chairs to be disruptive or inappropriate will be removed from the public hearing.

Individuals who would like to speak at the public hearing should access the hearing one-half hour before the hearing begins in order to be recognized and queued to speak. Each speaker will be allowed a maximum of five minutes to offer their remarks. Anyone who believes that they may need to exceed the five minute limit or who does not wish to speak at the public hearing but wishes to offer comments on the proposed revisions may submit their comments to the Advisory Committee on Appellate Rules by e-mail at Jill.Begemann@connapp.jud.ct.gov.

Hon. Richard N. Palmer

Hon. Alexandra D. DiPentima

Co-Chairs, Advisory Committee on Appellate Rules